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Race Relations Law Reporter

A Complete, Impartial Presentation of Basic Materials, Including:

- ★ *Court Cases*
- ★ *Legislation*
- ★ *Orders*
- ★ *Regulations*

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Recent Developments . . . A Summary

Education

Little Rock, *Arkansas,* school officials were ordered by federal district court to report within thirty days on implementation of the previously approved school integration plan (p. 17). Stating that school closings and community tension had made the plan impossible to execute, the officials asked for permission to petition the governor to return the closed schools to them for segregated operation for the remainder of the school year pending formulation of an acceptable new plan by August, 1959 (p. 18). Negro plaintiffs opposed the request, contending that the issue of "temporary delay" had already been disposed of by higher courts (p. 20). The Governor of *Arkansas* in his inaugural speech called for a state constitutional amendment sanctioning student aid on a local option basis and legislation allowing private school teachers to participate in the state's retirement system (p. 179).

In *Florida,* a federal district court, while declaring state school segregation requirements unconstitutional, held that the Pupil Assignment Law met the demand of Negro children for a prompt desegregation plan. For failure to seek administrative remedies under the law the children were refused injunctive relief (p. 21).

A federal district court in *Georgia* held unconstitutional a requirement that an applicant to an institution in the state University System furnish certificates from Georgia alumni concerning character, reputation, and intellect (p. 79). *Georgia* statutes, recently approved, give the governor power to close state schools and colleges when necessary to preserve order, and provide that contributions to private educational organizations shall be allowed as deductions under state income tax laws (pp. 180, 181).

The Fourth Circuit Court of Appeals affirmed a holding that an eleventh grade Negro girl was entitled to immediate admission to a "white" St. Mary's County, *Maryland,* high school, even though a gradual desegregation plan had currently been extended by local school officials only up through grade nine (p. 25).

The *Tennessee* Supreme Court affirmed the conviction of one of the parties charged with conspiring to dynamite a Clinton high school (p. 88).

Virginia statutes, under which a public school upon being integrated by federal authority would be automatically closed and cut off from state funds, which would then be used for payment of tuition grants for children enrolling in private schools, were declared by the state Supreme Court of Appeals to violate a state constitutional requirement that public free schools be maintained throughout the state (p. 65). A federal district court in the state enjoined the enforcement of state "massive resistance" laws as applied to NORFOLK public schools, holding that, even though those schools had been equally closed thereunder to all Norfolk children, equal protection had been denied them when public schools in other localities remained open (p. 45). In another suit, the same court enjoined Norfolk city officials from enforcing an ordinance (p. 41) and council resolutions (pp. 43, 44) providing for the closing of schools or grades by cutting off funds and eliminating specific grades in schools affected by desegregation (p. 45). The closed Norfolk schools were subsequently opened (p. 56).

In the case of 30 ARLINGTON Negro students who were denied transfers to "white" schools, the Court of Appeals for the Fourth Circuit affirmed a district court decree ordering the admission of four students, but deferred consideration of conclusions concerning the 26 remaining applicants (p. 36). The Chief Judge of the Fourth Circuit stayed a district court decree ordering the immediate admission of 12 CHARLOTTESVILLE Negro children to "white" schools, provided that the local school board submit within 20 days its plan for compliance with the decree by no later than September, 1959 (p. 39). In the case of 14 Negro children whose applications for assignment to "white" ALEXANDRIA schools had been denied by the local school board for failure to meet one or more of six criteria used by it for passing on transfer applications, a federal district court found no basis but race for the rejection of applications of nine of the children, whom it ordered admitted to specified "white" schools (p. 30).

Comments by the President (p. 5) and the

FREEDOM OF ASSOCIATION: A study of the current legislation and litigation limiting NAACP activity together with related legal background materials.
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Secretary of the Department of Health, Education and Welfare (p. 199) at news conferences reflected concern of the national executive branch of government over the *Virginia* school crisis, particularly as it affected the children of federal personnel stationed in the state. Following recommendations of the governor, submitted to a called special session (p. 183), the Virginia General Assembly passed acts designed to deal with school problems growing out of judicial reverses to the state's previous program of "massive resistance" (pp. 188, 189, 190, 191, 192).

Voting

The United States Civil Rights Commission held a hearing in Montgomery, *Alabama*, to investigate complaints of denial of voting rights to Negroes (p. 200). Certain officials refusing to testify and to produce subpoenaed documents, contempt proceedings were instituted in federal district court (p. 115).

Governmental Facilities

Because of a federal suit to compel integration of Montgomery, *Alabama*, public parks, several parks were closed (p. 206).

The Fourth Circuit Court of Appeals, for lack of federal jurisdiction in the absence of state action, affirmed a dismissal of a suit filed by Negro doctors seeking admission to practice in a privately operated hospital in Wilmington, *North Carolina* (p. 131).

The Fourth Circuit also affirmed the dismissal of a Negro attorney's action to have Norfolk, *Virginia*, officials enjoined from maintaining racial signs for court house restrooms (p. 130).

Organizations

The *Arkansas* Supreme Court affirmed a holding that a report of total donations from state residents during previous years to the NAACP, as distinguished from lists of individual contributors, was not privileged under free speech and press guarantees (p. 142). In another case in which *Arkansas* NAACP officers had been fined in state court for failing to furnish the names of contributors and dues payers upon demand by certain cities under their "Bennett Ordinances," the state supreme court affirmed the ordinances' constitutionality on the ground that they were uniformly applied to all organizations for the legitimate purpose of determining qualifications for claimed statutory tax immunity as charitable or non-profit organizations and that anonymity was not guaranteed under the circumstances (p. 136).

In *Florida*, the state supreme court upheld a lower court's order to witnesses (alleged officials and members of the NAACP's Miami Branch) subpoenaed by the Florida Legislative Investigation Committee in an investigation of the Communist Party and the extent of its infiltration into groups in specified fields of activity, requiring them to answer questions pertinent to the inquiry and to produce NAACP records for certain limited uses (p. 143).

Miscellaneous

The Fourth Circuit Court of Appeals held that prospective jurors in a federal court criminal trial of Negroes should have been permitted to answer voir dire questions regarding membership in "any organization dedicated toward racial hate," including the Ku Klux Klan and other specified organizations (p. 178).

The United States Supreme Court reversed an *Arizona* Supreme Court decision that a state court had jurisdiction over a cause of action by a non-Indian against Indians, arising on an Indian reservation, the Supreme Court holding that tribal courts had jurisdiction (p. 9).

Georgia statutes and Atlanta ordinances requiring racial segregation on trolley buses were declared unconstitutional by a federal district court, but an injunction was denied in the absence of a "clear and imminent danger" that attempts would be made to enforce the invalidated laws (p. 166).

In *New Jersey*, Chancery Division of Superior Court held that racially restrictive covenants in burial plot deeds of a cemetery company were contrary to public policy and void (p. 158).

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PRESIDENT

EDUCATION
Public Schools—Federal Action

On January 21, 1959, the following exchanges were recorded at the President's press conference concerning the public school education affecting federal personnel in Virginia, the governor of Virginia's call on Virginians to stand firm against integration, the President's attitude toward desegregation, and a Senate proposal to create a federal conciliation service on civil rights problems.

MERRIMAN SMITH of United Press International—In Virginia, the state and Federal courts have ruled against laws that would have preserved school segregation. Yet the Governor of Virginia calls on his people to stand firm against integration. He says he has only begun to fight. Well, involved in this situation, sir, particularly in Norfolk, are the children of military personnel.

Now, if these schools remain closed, are you going to do anything to assure a public school education in Virginia and elsewhere for children of Federal personnel so situated?

Answer— Well, it's a very difficult question, and I have been going into it for a considerable time. There are something on the order of 15,000 students of this age in the city of Norfolk, and I think of this number about 5,500 are of military personnel, the sons and daughters of enlisted men and officers largely in the Navy.

Now, of this number of 5,500, something on the order of 500 are children of people that actually live on the post, that is, on the Federal reservation.

Now, I am told they have been informed, that HEW [the Department of Health, Education and Welfare] and the Navy are now authorized by law to work out or to conduct educational operations that would be legal on the post. But I think the position with respect to the other 4,500 is not so clear.

Of course, these folks all pay their taxes indirectly through the rents they pay, and also on the things they buy, sales taxes and all that sort of thing. So they are entitled to education, just like any other youngster of the city.

More than that, I should point this out—and many people do not know it. The Federal Government, over the past something like eight or nine years, has put in $900,000,000 into building about 40,000 public school rooms and in this coming year has got something like fifty or fifty-one million dollars in the budget for building school rooms, and something in the order of $135,000 for conducting educational operations, all of this on the basis of these Federally-impacted areas, Norfolk of which is being one.

Now, the only thing I can say with respect to that problem, which I think is critical, is that both HEW and the Navy, or the Defense Department, are working on it very hard to see whether at least that part of it, that responsibility cannot be carried out.

* * *

WILLIAM MCGAFFIN of The Chicago Daily News—Mr. President, you have always appealed for implementation of school desegregation on the grounds that Supreme Court orders must be obeyed. But many persons feel you could exert a strong moral backing for desegregation if you said that you personally favored it. If you favor it, sir, why have you not said so; if you are opposed to it, could you tell us why?

Answer— Because, I'll tell you why. I do not believe it is the function or indeed it is desirable for a President to express his approval or disapproval of any Supreme Court decision. His job is, for which he takes an oath, is to execute the laws.

Now, if he, in advance of such execution, says "I don't like it but I will do it," and in the other cases "I do like it, I will do it," he is constantly laying over the whole—laying the whole law enforcement processes of the Federal Government open to the suspicion that he is doing his duty one time well and the other time not well.

Now, I just say this is not—I don't object to anyone else in the whole world disagreeing publicly with opinions or decisions of the court, or agreeing with them. I say I have got a particular function and I think it would make it more difficult to carry out that function if I indulged in that kind of, let's say, personal action with respect to court decisions.

* * *

GARNET D. HORNER of The Washington Evening Star—Mr. President, aside from the particular impact of the closed schools in Norfolk on the children of Federal workers, military personnel, could you comment on the situation posed by the Virginia Governor's call on his people to strengthen their defiance of the court decision?

Answer—Well, Mr. Horner, I don't know exactly what he means. Their own laws have been—allow them to discriminate in giving aid to one particular district and not to another, have apparently been declared invalid by their Supreme Court. You know about the decisions of the United States Supreme Court.

It would appear that the laws in this matter, then, are clear as interpreted by the courts. If that is true—and let's remember again that I am not a lawyer, and I don't know that the court battle is finished—but if that is true, it would seem to me the question comes down—is the United States citizen, be he an official or be he a man that is working in civil life, and outside of government, ready to obey the laws of his state and of his nation? And I think that is the real question that we have all got to meet.

* * *

CARLETON KENT of The Chicago Sun Times—Mr. President, what do you think of the proposal in the Senate to create a Federal conciliation service on civil rights matters?

Answer—Well, it's one I haven't studied particularly. Of course, in the Civil Rights Commission, in establishing it, recommending it, and certainly I am going to, as I have indicated before, recommend that it be continued, that was one of the things that we hoped would come about as a part of its duty of making certain that the voting rights of citizens were not interfered with by reason of race and color and so on.

Now, I don't believe that to put up an organizational part of Government with the function of conciliating these things would at the moment be fruitful, but I certainly could be convinced. My mind is not closed. I just haven't had the idea before.

Subsequently, on February 5, 1959, the President sent a message to Congress in support of legislative proposals dealing with public school integration and other civil rights matters. The seven-point program recommends legislation: (1) making the use of force or threats of force to obstruct court orders in school segregation cases a federal offense; (2) broadening the Federal Bureau of Investigation's authority to investigate the destruction, or attempted destruction, of schools and places of worship by making interstate flight to avoid detention or prosecution for such a crime a federal offense; (3) requiring voting registrars to maintain their records for three years and empowering the Justice Department to obtain such records under orders of any federal district court; (4) providing, for the next two fiscal years, financial and technical aid to state and local agencies to assist in adjustments necessitated by school desegregation decisions; (5) authorizing, when schools serving children of military personnel are closed to avoid integration, provision for schooling on military bases or taking and operating closed schools which had been built in whole or part from federal funds; (6) converting the President's Committee on Government Contracts into a statutory commission on equal job opportunity under government contracts; and (7) extending the life of the Civil Rights Commission [2 Race Rel. L. Rep. 1011 (1957)] for two years past its scheduled end in September, 1959. The President's message is reproduced below:

TO THE CONGRESS OF THE UNITED STATES:

Two principles basic to our system of government are that the rule of law is supreme, and that every individual regardless of his race, religion, or national origin is entitled to the equal protection of the laws. We must continue to seek every practicable means for reinforcing these principles and making them a reality for all.

The United States has a vital stake in striving wisely to achieve the goal of full equality under law for all people. On several occasions I have stated that progress toward this goal depends not on laws alone but on building a better understanding. It is thus important to remember that any further legislation in this field must be clearly designed to continue the substantial progress that has taken place in the past few years. The recommendations for legislation which I am making have been weighed and formulated with this in mind.

First, I recommend legislation to strengthen the law dealing with obstructions of justice so as to provide expressly that the use of force or threats of force to obstruct court orders in school desegregation cases shall be a federal offense.

There have been instances where extremists have attempted by mob violence and other concerted threats of violence to obstruct the accomplishment of the objectives in school decrees. There is a serious question whether the present obstruction of justice statute reaches such acts of obstruction which occur after the completion of the court proceedings nor is the contempt power a satisfactory enforcement weapon to deal with persons who seek to obstruct court decrees by such means.

The legislation that I am recommending would correct a deficiency in the present law and would be a valuable enforcement power on which the government could rely to deter mob violence and such other acts of violence or threats which seek to obstruct court decrees in desegregation cases.

Second, I recommend legislation to confer additional investigative authority on the FBI in the case of crimes involving the destruction or attempted destruction of schools or churches, by making flight from one state to another to avoid detention or prosecution for such a crime a federal offense.

All decent, self-respecting persons deplore the recent incidents of bombings of schools and places of worship. While state authorities have been diligent in their execution of local laws dealing with these crimes, a basis for supplementary action by the federal government is needed.

Such recommendation when enacted would make it clear that the FBI has full authority to assist in investigations of crimes involving bombings of schools and churches. At the same time, the legislation would preserve the primary responsibility for law enforcement in local law enforcement agencies for crimes committed against local property.

Third, I recommend legislation to give the attorney general power to inspect federal election records, and to require that such records be preserved for a reasonable period of time so as to permit such inspection.

The right to vote, the keystone of democratic self-government, must be available to all qualified citizens without discrimination. Until the enactment of the Civil Rights Act of 1957, the government could protect this right only through criminal prosecutions instituted after the right had been infringed. The 1957 act attempted to remedy this deficiency by authorizing the attorney general to institute civil proceedings to prevent such infringements before they occurred.

A serious obstacle has developed which minimizes the effectiveness of this legislation. Access to registration records is essential to determine whether the denial of the franchise was in furtherance of a pattern of racial discrimination. But during preliminary investigations of complaints the Department of Justice, unlike the Civil Rights Commission, has no authority to require the production of election records in a civil proceeding. State or local authorities, in some instances, have refused to permit the inspection of their election records in the course of investigations. Supplemental legislation, therefore, is needed.

Fourth, I recommend legislation to provide a temporary program of financial and technical aid to state and local agencies to assist them in making the necessary adjustments required by school desegregation decisions.

The Department of Health, Education, and Welfare should be authorized to assist and cooperate with those states which have previously required or permitted racially segregated public schools, and which must now develop programs of desegregation. Such assistance should consist of sharing the burdens of transition through grants-in-aid to help meet additional costs di-

rectly occasioned by desegregation programs, and also of making technical information and assistance available to state and local educational agencies in preparing and implementing desegregation programs.

I also recommend that the commissioner of education be specifically authorized, at the request of the states or local agencies, to provide technical assistance in the development of desegregation programs and to initiate or participate in conferences called to help resolve educational problems arising as a result of efforts to desegregate.

Fifth, I recommend legislation to authorize, on a temporary basis, provision for the education of children of members of the armed forces when state-administered public schools have been closed because of desegregation decisions or orders.

The federal government has a particular responsibility for the children of military personnel in federally affected areas, since armed services personnel are located there under military orders rather than of their own free choice. Under the present law, the commissioner of education may provide for the education of children of military personnel only in the case of those who live on military reservations or other federal property. The legislation I am recommending would remove this limitation.

Sixth, I recommend that congress give consideration to the establishing of a statutory commission on equal job opportunity under government contracts.

Non-discrimination in employment under government contracts is required by executive orders. Through education, mediation, and persuasion, the existing committee on government contracts has sought to give effect not only to this contractual obligation, but to the policy of equal job opportunities generally. While the program has been widely accepted by government agencies, employers and unions, and significant progress has been made, full implementation of the policy would be materially advanced by the creation of a statutory commission.

Seventh, I recommend legislation to extend the life of the Civil Rights Commission for an additional two years. While the commission should make an interim report this year within the time originally fixed by law for the making of its final report, because of the delay in getting the commission appointed and staffed, an additional two years should be provided for the completion of its task and the making of its final report.

I urge the prompt consideration of these seven proposals.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
FEBRUARY 5, 1959.

UNITED STATES SUPREME COURT

INDIAN RESERVATIONS
Jurisdiction—Arizona

Paul WILLIAMS and Lorena Williams v. Hugh LEE, d/b/a Ganado Trading Post.

United States Supreme Court, January 12, 1959, No. 39,.....U.S....., 79 S.Ct. 269.

SUMMARY: A non-Indian, operating a general store on the Navajo Indian reservation in Arizona under a license required by federal statute, brought an action in a state court against a Navajo Indian and his wife, reservation residents, to recover for goods sold to them on credit. Defendants' motion to dismiss on the ground that jurisdiction lay in the tribal court rather than in the state court was denied, and judgment was rendered for plaintiff. The Supreme Court of Arizona affirmed, holding that since no congressional act expressly forbids their doing so, Arizona courts may exercise jurisdiction over civil suits by non-Indians against Indians although the cause of action arises on an Indian reservation. 83 Ariz. 241, 319 P.2d 998, 3 Race Rel. L. Rep. 267 (1958). The Supreme Court of the United States granted certiorari and reversed, stating that implicit in the 1868 treaty establishing this Navajo reservation was the understanding that jurisdiction of Indian internal affairs was to remain exclusively with the tribal government. The court pointed to subsequent congressional and administrative measures improving the Navajo legal system, and to the present-day broad criminal and civil jurisdiction of the Navajo Courts of Indian Offenses, covering suits by outsiders against Indian defendants. It was asserted that to allow the exercise of state judisdiction in this case would be to undermine tribal-court authority over reservation affairs and infringe on the Indians' right of self-government.

BLACK, Justice.

Mr. Justice BLACK delivered the opinion of the Court.

Respondent, who is not an Indian, operates a general store in Arizona on the Navajo Indian Reservation under a license required by federal statute.[1] He brought this action in the Superior Court of Arizona against petitioners, a Navajo Indian and his wife who live on the Reservation, to collect for goods sold them there on credit. Over petitioners' motion to dismiss on the ground that jurisdiction lay in the tribal court rather than in the state court, judgment was entered in favor of respondent. The Supreme Court of Arizona affirmed, holding that since no Act of Congress expressly forbids their doing so Arizona courts are free to exercise jurisdiction over civil suits by non-Indians against Indians though the action arises on an Indian reservation. 83 Ariz. 241, 319 P.2d 998. Because this was a doubtful determination of the important question of state power over Indian affairs, we granted certiorari. 356 U.S. 930, 78 S.Ct. 772, 2 L.Ed.2d 761.

1. 31 Stat. 1066, as amended, 32 Stat. 1009, 25 U.S.C. § 262, 25 U.S.C.A. § 262, provides: "Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians."

[*Historical Background*]

Originally the Indian tribes were separate nations within what is now the United States. Through conquest and treaties they were induced to give up complete independence and the right to go to war in exchange for federal pro-

tection, aid, and grants of land. When the lands granted lay within States these governments sometimes sought to impose their laws and courts on the Indians. Around 1830 the Georgia Legislature extended its laws to the Cherokee Reservation despite federal treaties with the Indians which set aside this land for them.[2] The Georgia statutes forbade the Cherokees from enacting laws or holding courts and prohibited outsiders from being on the Reservation except with permission of the State Governor. The constitutionality of these laws was tested in Worcester v. State of Georgia, 6 Pet. 515, 8 L.Ed. 483, when the State sought to punish a white man, licensed by the Federal Government to practice as a missionary among the Cherokees, for his refusal to leave the Reservation. Rendering one of his most courageous and eloquent opinions, Chief Justice Marshall held that Georgia's assertion of power was invalid. "The Cherokee nation * * * is a distinct community, occupying its own territory * * * in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States." 6 Pet. at page 561.

Despite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in Worcester[3] the broad principles of that decision came to be accepted as law.[4] Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained. Thus, suits by Indians against outsiders in state courts have been sanctioned. See Felix v. Patrick, 145 U.S. 317, 332, 12 S.Ct. 862, 867, 36 L.Ed. 719; United States v. Candelaria, 271 U.S. 432, 46 S.Ct. 561, 70 L.Ed. 1023. See also Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456. And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation. E. g., People of State of New York ex rel. Ray v. Martin, 326 U.S. 496, 66 S.Ct. 307, 90 L.Ed. 261. But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive.[5] Donnelly v. United States, 228 U.S. 243, 269-272, 33 S.Ct. 449, 458-459, 57 L.Ed. 820; Williams v. United States, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962. Essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. Cf. Utah & Northern R. Co. v. Fisher, 116 U.S. 28, 6 S.Ct. 246, 29 L.Ed. 542.

[*Congressional Policy*]

Congress also has consistently acted upon the assumption that the States have no power to regulate the affairs of Indians on a reservation. To assure adequate government of the Indian tribes it enacted comprehensive statutes in 1834 regulating trade with Indians and organizing a Department of Indian Affairs. 4 Stat. 729, 4 Stat. 735. Not satisfied solely with centralized government of Indians, it encouraged tribal governments and courts to become stronger and more highly organized. See, e.g., the Wheeler-Howard Act, §§ 16, 17, 48 Stat. 987, 988, 25 U.S. C. §§ 476, 477, 25 U.S.C.A. §§ 476, 477. Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society. This policy contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens that go with

2. The Georgia laws are set out extensively in Worcester v. State of Georgia, 6 Pet. 515, 521-528. The principal treaties involved are found at 7 Stat. 18; 7 Stat. 39.

3. For interesting accounts of this episode in the struggle for power between state and federal governments see IV Beveridge, The Life of John Marshall, 539-552; I Warren, The Supreme Court in United States History, c. 19. See also Cherokee Nation v. State of Georgia, 5 Pet. 1, 8 L.Ed. 25.

4. See The Kansas Indians, 5 Wall. 737, 18 L.Ed. 667; Ex parte Crow Dog, 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030; United States v. Kagama, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228; United States v. Forness, 2 Cir., 125 F.2d 928; Iron Crow v. Oglala Sioux Tribe, 8 Cir., 231 F.2d 89; Begay v. Miller, 70 Ariz. 380, 222 P.2d 624; Cohen, Federal Indian Law (Revision by the United States Interior Department 1958); 55 Decisions of the Department of the Interior 56-64.

The Federal Government's power over Indians is derived from Art. 1, § 8, cl. 3, of the United States Constitution, Perrin v. United States, 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691, and from the necessity of giving uniform protection to a dependent people. United States v. Kagama, supra.

5. For example, Congress has granted to the federal courts exclusive jurisdiction upon Indian reservations over 11 major crimes. And non-Indians committing crimes against Indians are now generally tried in federal courts. See 18 U.S.C. §§ 437-439, 1151-1163, 18 U.S.C.A. §§ 437-439, 1151-1163; Cohen, op. cit. supra, note 4, at 307-326.

it as soon as the educational and economic status of the Indians permits the change without disadvantage to them. See H.R.Rep. No. 848, 83d Cong., 1st Sess. 3, 6, 7 (1953). Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which Worcester v. State of Georgia had denied.[6]

[*Treaty of 1868*]

No departure from the policies which have been applied to other Indians is apparent in the relationship between the United States and the Navajos. On June 1, 1868, a treaty was signed between General William T. Sherman, for the United States, and numerous chiefs and headmen of the "Navajo nation or tribe of Indians".[7] At the time this document was signed the Navajos were an exiled people, forced by the United States to live crowded together on a small piece of land on the Pecos River in eastern New Mexico, some 300 miles east of the area they had occupied before the coming of the white man. In return for their promises to keep peace, this treaty "set apart" for "their permanent home" a portion of what had been their native country, and provided that no one, except United States Government personnel, was to enter the reserved area. Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in Worcester v. State of Georgia, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed. Since then, Congress and the Bureau of Indian Affairs have assisted in strengthening the Navajo tribal government and its courts. See the Navajo-Hopi Rehabilitation Act of 1950, § 6, 64 Stat. 46, 25 U.S.C. § 636, 25 U.S.C.A. § 636; 25 CFR §§ 11.1 through 11.87 NII. The Tribe itself has in recent years greatly improved its legal system through increased expenditures and better trained personnel. Today the Navajo Courts of Indian Offenses exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants.[8] No Federal Act has given state courts jurisdiction over such controversies.[9] In a general statute Congress did express its willingness to have any State assume jurisdiction over reservation Indians if the State Legislature or the people vote affirmatively to accept such responsibility.[10] To date, Arizona has not accepted jurisdiction, possibly because the people of the State anticipate that the burdens accompanying such power might be considerable.[11]

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6. See, e. g., 62 Stat. 1224, 64 Stat. 845, 25 U.S.C. §§ 232, 233, 25 U.S.C.A. §§ 232, 233 (granting broad civil and criminal jurisdiction to New York); 18 U.S.C. § 1162, 18 U.S.C.A. § 1162, 28 U.S.C. §1360, 28 U.S.C.A. § 1360 (granting broad civil and criminal jurisdiction to California, Minnesota, Nebraska, Oregon, and Wisconsin). The series of statutes granting extensive jurisdiction over Oklahoma Indians to state courts are discussed in Cohen, op. cit. supra, note 4, at 985-1051.

7. 15 Stat. 667. In 16 Stat. 566 (1871), Congress declared that no Indian tribe or nation within the United States should thereafter be recognized as an independent power with whom the United States could execute a treaty but provided that this should not impair the obligations of any treaty previously ratified. Thus the 1868 treaty with the Navajos survived this Act.

8. Young, The Navajo Yearbook (1953), 165; id. (1957), 107, 110.

9. In the 1949 Navajo-Hopi Rehabilitation Bill, S. 1407, 81st Cong., 1st Sess., setting up a 10-year program of capital and other improvements on the Reservation, Congress provided for concurrent State, federal and tribal jurisdiction. President Truman vetoed the bill because he felt that subjecting the Navajo and Hopi to state jurisdiction was undesirable in view of their illiteracy, poverty, and primitive social concepts. He was also impressed by the fact that the Indians vigorously opposed the bill. 95 Cong. Rec. 14784-14785. After the objectionable features of the bill were deleted it was passed again and became law. 64 Stat. 44, 25 U.S.C. §§ 631-640, 25 U.S.C.A. §§ 631-640.

10. Act of Aug. 15, 1953, c. 505, §§ 6, 7, 67 Stat. 590, provides as follows: "Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, that the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

"* * * The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof." 28 U.S.C.A. § 1360 note.

Arizona has an express disclaimer of jurisdiction over Indian lands in its Enabling Act, § 20, 36 Stat. 569, A.R.S., and in Art. 20, Fourth, of its constitution, A.R.S. Cf. Draper v. United States, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419.

11. See H.R.Rep. No.848 83rd Cong., 1st Sess. 3, 7 (1953); Secretary of Interior, Annual Report (1953), 247-248; id. (1956), 215-216; id. (1957), 253-254.

[*Tribal Authority Respected*]

There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. Cf. Donnelly v. United States, supra; Williams v. United States, supra. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it. Lone Wolf v. Hitchcock, 187 U.S. 553, 564-566, 23 S.Ct. 216, 220-221, 47 L.Ed. 299.

Reversed.

MISCELLANEOUS ORDERS

The United States Supreme Court:

Denied Certiorari (i.e., declined to review):

Barta v. Oglala Sioux Tribe of the Pine Ridge Reservation (Prior decision 259 F.2d 553 [8th Cir. 1958] sustaining federal jurisdiction of suits in name of United States in behalf of Indian tribe to collect from non-member lessees of tribal trust lands tax levied under approved tribal constitution). No. 548, January 12, 1959, 79 S.Ct. 320. Another decision: 146 F.Supp. 917 (1956).

Bristol et al. v. Heaton et al. (Prior decision 317 S.W.2d 86 [Texas Court of Civil Appeals, 1958] holding that denial of admission to female applicants to all-male state college was not a violation of the equal protection and privileges and immunities clauses of U. S. Constitution). No. 581 Misc., April 6, 1959, 27 L.W. 3281, order: "PER CURIAM. The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for certiorari, certiorari is denied."

Cohen v. Public Housing Administration, et al., (Prior decision 257 F.2d 73, 3 Race Rel. L. Rep. 700 [5th Cir. 1958] affirming dismissal of suit to compel admission of Negro to a public housing project in absence of any attempt to apply). No. 505, January 12, 1959, 79 S.Ct. 315. Other decisions: 1 Race Rel. L. Rep. 347 (1956), 2 Race Rel. L. Rep. 109, 1122 (1957).

Dawley v. City of Norfolk, et al. (Prior decision 260 F.2d 647, 4 Race Rel. L. Rep. 130, *infra* [4th Cir. 1958] affirming dismissal of a Negro attorney's action to have city officials enjoined from maintaining signs designating court house restrooms as being for colored persons). No. 674, March 9, 1959, 79 S.Ct. 650. Another decision: 3 Race Rel. L. Rep. 213 (1958).

Hannahville Indian Community et al. v. Prairie Band of Potawatomi Indians et al. (Prior decision 165 F.Supp. 139, 3 Race Rel. L. Rep. 1219 [U. S. Court of Claims, 1958] affirming Indians Claims Commission dismissal of petition by stray bands of Wisconsin Indians to intervene in proceeding by which Trans-Mississippi Indian bands of the same nation sought to recover difference in sum of money paid the nation in 1846 for Iowa and Kansas lands and the then value of such lands). No. 627, February 24, 1959, 79 S.Ct. 587.

Oliphant et al. v. Brotherhood of Locomotive Firemen and Enginemen (Prior decision 262 F.2d 359, 3 Race Rel. L. Rep. 1195 [6th Cir. 1958] affirming a district court decision that the Railway Labor Act does not prevent racial discrimination in admission practices of unions certified as bargaining representatives under the Act, a union not being made a federal agency by virtue of such certification). No. 560, March 9, 1959, 79 S.Ct. 648, order: "In view of the abstract context in which the questions sought to be raised are presented by this record, the petition for certiorari to the United States Court of Appeals for the Sixth Circuit is denied." *Rehearing denied*, April 6, 1959, 27 L.W. 3281. Other decisions: 2 Race Rel. L. Rep. 1128 (1957), 3 Race Rel. L. Rep. 6 (1958).

St. Regis Tribe of Mohawk Indians v. State of New York (Prior decision 5 N.Y.2d 24, 177 N.Y.S.2d 289 [N.Y. Court of Appeals, 1958] affirming a dismissal of a claim by Indian tribe for $33.8 million for an island appropriated by the state for a power project, holding that the tribe had surrendered claim for money payment in 1856 and were not entitled now as a matter of due process to payment for the bare right of occupancy and that the Federal Indian Intercourse Act does not apply to the state). No. 613, February 24, 1959, 79 S.Ct. 586. Other decisions: 4 Misc. 2d 110, 158 N.Y.S.2d 540 (1956); 5 A.D.2d 117, 168 N.Y.S.2d 894 (1957).

Syres v. Oil Workers International Union, Local 23, et al. (Prior decision 257 F.2d 479, 3 Race Rel. L. Rep. 998 [5th Cir. 1958] holding that individual Negro plaintiffs could not recover vicariously on a theory of averages for damages allegedly suffered by members of their class from discriminatory provisions of an employment contract, but must prove actual, personal pecuniary loss). No. 510, January 12, 1959, 79 S.Ct. 315. Other decisions: 1 Race Rel. L. Rep. 20, 192 (1956).

United States v. The Kiowa, Comanche and Apache Tribes of Indians; Kiowa, Comanche and Apache Tribes of Indians v. United States (Prior decision 166 F.Supp. 939 [U. S. Court of Claims, 1958] holding that it was not error for the U. S. Claims Commission, in awarding Indian tribes a recovery based on difference between the value of and the price paid for Indian lands ceded to the U. S. in 1900, not to offset under an 1891 statute depredation judgments paid on their account from the federal treasury and that payments to individual indigent Indians were not legal offsets against an award to their tribes). Nos. 664, 665, March 9, 1959, 79 S.Ct. 650. Another decision: 163 F.Supp. 603 (1958).

Judgment stayed:

Gibson et al. v. Florida Legislative Investigation Committee (Prior decision 108 So.2d 729, 4 Race Rel. L. Rep. 143, *infra* [Fla. Supreme Court, 1958] upholding a lower court's order to witnesses, alleged to be officials and members of the NAACP's Miami, Florida branch, and subpoenaed in a legislative committee investigation of the Communist Party and the extent of its infiltration into groups in certain fields of activity, requiring them to answer pertinent questions and to produce NAACP records for certain limited uses by the state). February 24, 1959, 79 S.Ct. 576, order: "The application for a stay of the judgment of the Supreme Court of Florida and proceedings thereto, presented to Mr. Justice Black, and by him referred to the Court, is granted and the execution of such judgment and proceedings pursuant thereto is stayed pending the timely filing and disposition of a petition for certiorari." See also, In re *Petition of Graham*, 104 So.2d 16, 3 Race Rel. L. Rep. 724 (Fla. 1958).

Other orders:

Cooke, et al. v. State of North Carolina (Prior decision 248 N.C. 485, 103 S.E.2d 846, 3 Race Rel. L. Rep. 687 [1958] holding that in a prosecution of Negroes for trespassing on city-owned golf courses which had been leased to a private operator the trial court is not required to take judicial notice of facts found in a civil action in federal district court that

had enjoined racial discrimination in operation of the same facilities). No. 466, January 12, 1959, 79 S.Ct. 312, order: "Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits." March 30, 1959, 27 L.W. 3271, order: "Upon consideration of the suggestion of death the appeal of Phillip Cooke is dismissed as abated." Another decision: 246 N.C. 518, 98 S.E.2d 885, 2 Race Rel. L. Rep. 818 (1957). See also, *Simkins v. City of Greensboro,* 149 F.Supp. 562, 2 Race Rel. L. Rep. 605 (M.D. N.C. 1957); *aff'd,* 246 F.2d 425, 2 Race Rel. L. Rep. 817 (4th Cir. 1957).

County School Board of Arlington County, Virginia, et al. v. Hamm, et al. (Prior decision 263 F.2d 226, 4 Race Rel. L. Rep.____, *infra* [4th Cir. 1959] affirming a district court decree ordering the admission of four Negro students to "white" Arlington, Virginia, public schools). Statement by Chief Justice Warren: "Upon consideration of the memorandum in support of the application and of the opposition thereto, I conclude that the test of extraordinary showing required in these circumstances by *Magnum Import Co. v. Coty,* 262 U.S. 159, 164, has not been met. The motion for recall and stay of mandate of the United States Court of Appeals for the Fourth Circuit is denied." Other decisions: 1 Race Rel. L. Rep. 890 (1956), 2 Race Rel. L. Rep. 59, 300, 810, 987 (1957), 3 Race Rel. L. Rep. 187, 931 (1958).

Cases docketed:

Bates v. City of Little Rock (Prior decision 319 S.W.2d 37, 4 Race Rel. L. Rep. 136, *infra* [Ark. Supreme Court, 1958] affirming the constitutionality of ordinances requiring organizations, upon demand, to furnish to cities wherein they operate the names of contributors and dues payers for purposes of aiding in determination of eligibility for statutory tax immunity as charitable or non-profit organization). No. 770, March 13, 1959, 27 L.W. 3262.

Eaton et al. v. Board of Managers of the James Walker Memorial Hospital et al. (Prior decision 261 F.2d 521, 4 Race Rel. L. Rep. 131, *infra,* [4th Cir. 1958] affirming, for lack of federal jurisdiction in the absence of state action, a dismissal of a suit filed by Negro doctors seeking admission to practice in a privately operated hospital). No. 789, March 23, 1959, 27 L.W. 3272. Another decision: 3 Race Rel. L. Rep. 1006 (1958).

National Association for the Advancement of Colored People v. State of Alabama ex rel. Patterson (Prior decision 109 So.2d 138 [Ala. Supreme Court, 1959] affirming again, except as to membership lists, a judgment of contempt by an Alabama state court against the NAACP for refusing to obey a court order to produce "certain books, papers and documents" described in the order. The case had been remanded by the U. S. Supreme Court which had held on certiorari that the NAACP could constitutionally refuse to produce its membership lists). No. 753, March 6, 1959, 27 L.W. 3249. Other decisions: 1 Race Rel. L. Rep. 707, 917, 919 (1956); 2 Race Rel. L. Rep. 177 (1957); 3 Race Rel. L. Rep. 611 (1958).

National Association for the Advancement of Colored People v. State of Arkansas, ex rel. Bruce Bennett (Prior decision 319 S.W.2d 33, 4 Race Rel. L. Rep. 142, *infra,* [Ark. Supreme Court, 1958] affirming a holding that a report of total donations from state citizens during previous years to the NAACP, rather than lists of individual contributors, was not privileged under free speech and press guarantees). No. 772, March 13, 1959, 27 L.W. 3262.

National Association for the Advancement of Colored People v. State of Arkansas (Prior decision____F.Supp.____ [E.D. Ark. 1959] holding, in NAACP suit to restrain enforcement of state barratry statute and statute authorizing county judges to compel production of membership lists of organizations engaged in activities designed to interfere with state control and operation of schools, that federal court should not pass on statutes' constitutionality, even if obviously unconstitutional, until efforts to obtain adjudication in state courts have been exhausted). No. 757, March 9, 1959, 27 L.W. 3261.

National Association for the Advancement of Colored People et al. v. Williams (Prior decision 98 Ga. App. 74, 104 S.E.2d 923, 3 Race Rel. L. Rep. 980 [Ga. Court of Appeals, 1958] holding that, where the certificate of the trial judge that the bill of exceptions was true and specified all the evidence and record material was contradicted by his other certificate only conditionally approving the brief of evidence, the Georgia Court of Appeals lacked jurisdiction of NAACP's appeal from trial court's order adjudging it in contempt for disobeying order to produce records for state income tax purposes). No. 783, March 20, 1959, 27 L.W. 3262. Other decisions: 2 Race Rel. L. Rep. 181 (1956), 3 Race Rel. L. Rep. 312 (1957); 107 S.E.2d 243 (Ga. App. 1958).

State Athletic Commission v. Dorsey (Prior decision 168 F.Supp. 149, 3 Race Rel. L. Rep. 1232 [E.D. La. 1958] holding Louisiana statutory and administrative prohibitions against "mixed" athletic contests violative of the equal protection clause of the Fourteenth Amendment and rejecting contention that suit for declaratory judgment to that effect and for injunction against state Athletic Commission was contrary to Eleventh Amendment). No. 787, March 21, 1959, 27 L.W. 3272.

COURTS

EDUCATION
Public Schools—Arkansas (Little Rock)

John AARON et al. v. William G. COOPER, et al.
John AARON et al. v. Ed. I. McKINLEY, et al.

United States District Court, Eastern District, Arkansas, Western Division, January 9, 1959, Civil Action No. 3113.

SUMMARY: Negro students petitioned federal district court on September 24, 1958, seeking to enjoin Little Rock public school officials from leasing to a private school corporation school properties which had been closed by order of the governor on September 12, under authority of state statutes. The petition was dismissed on the ground that relief could be granted only by a three-judge court. The school board commenced leasing negotiations, but on September 29 the Court of Appeals for the Eighth Circuit issued a temporary restraining order against such activity. See 3 Race Rel. L. Rep. 851-895 (1958). After the restraining order was twice extended, the Court of Appeals on November 10, 1958, ordered the judgment of the district court vacated and remanded the cause for entry of an injunction against the school officials taking any further action to transfer possession or control of public school properties to any person for the carrying on of segregated school operations. The court also directed the taking of such affirmative steps as the district court might direct to facilitate and accomplish the integration of the Little Rock school district under the existing ("Blossom") school plan. 261 F.2d 97, 3 Race Rel. L. Rep. 1135 (8th Cir. 1958). The district court, on January 9, 1959, ordered defendants to submit within thirty days a detailed report of affirmative action, taken and proposed, toward carrying out the Blossom plan. Twelve days later the defendants reported that because of school closings and district-wide tension it was impossible for them to carry out the integration plan. They moved, instead, (1) to petition the governor to return the closed schools to defendants for segregated operation; (2) if the petition were successful, to open the schools on such basis as early as possible in view of the scheduled beginning of the next term on January 26, 1959, particularly for the benefit of children not presently enrolled in private schools; and (3) to undertake a study, with expert assistance, to the end of developing and reporting an acceptable new plan by August 15, 1959. Plaintiffs attacked the motion as not in compliance with the Court of Appeals' mandate and the district court's order and also as raising again the issue of "temporary delay" already disposed of adversely to defendants by the Court of Appeals on August 18, 1958 [257 F.2d 33, 3 Race Rel. L. Rep. 621 (1958)] and the United States Supreme Court on September 29, 1958 [78 S.Ct. 1401, 3 Race Rel. L. Rep. 855 (1958)]. Meanwhile, a three-judge court was designated to try an injunction suit between the parties to test the constitutionality of certain Arkansas statutes. The district court judgment of January 9, 1959, the report and motion of defendants, plaintiffs' answer thereto, and the order convening the three-judge court follow.

JUDGMENT

On January 6, 1959, the date heretofore fixed for the purpose of determining the provisions and terms of the judgment to be entered by this court in accordance with directions contained in the mandate of the United States Court of Appeals for the Eighth Circuit, issued December

2, 1958, and filed herein December 4, 1958, the plaintiffs appeared by their attorneys, Messrs. Thurgood Marshall and Wiley A. Branton, the defendants appeared by their attorneys, Messrs. Pat Mehaffy, Herschel H. Friday, Jr., and Robert V. Light, of the firm of Mehaffy, Smith & Williams, and the United States of America, amicus curiae, appeared by Messrs. Osro Cobb and Donald B. MacGuinneas, the same is submitted upon the said mandate and the opinion of the United States Court of Appeals for the Eighth Circuit, dated November 10, 1958; the oral argument of the attorneys for the respective parties and for the United States of America as amicus curiae, and upon consideration and in accordance with the directions contained in said mandate and opinion.

IT IS ORDERED, ADJUDGED AND DECREED:

1. That this court's order entered September 25, 1958, denying and dismissing plaintiffs' motion for further relief be and is set aside and vacated.

2. That defendants, Ed I. McKinley, Jr., Everett A. Tucker, Jr., Ted L. Lamb, Russell H. Matson, Robert W. Laster, Ben D. Rowland, Sr., and Terrill E. Powell, and officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, are hereby enjoined from taking any further steps or action without the express approval of this court:

(a) to transfer possession, control or operation, whether directly or indirectly, of any of the senior high schools or any other property or facilities of the Little Rock School District, to any organization or person for carrying on any segregated school operations of any nature;

(b) from engaging in any other acts, whether independently or in participation with anyone else, which are capable of serving to impede, thwart or frustrate the execution of the integration plan mandated against them and which was approved May 24, 1955, by the then Board of Directors of the Little Rock School District.

3. That the said defendants are further directed, in accordance with the said mandate, to move forward within their official powers to carry out the integration plan, and to take affirmative steps on their own initiative consistent with their official powers to facilitate and accomplish the operation of the Little Rock School District on a non-discriminatory basis.

4. That within thirty days from the date hereof said defendants shall submit to the court a specific and detailed report of the affirmative steps they have taken and propose to take in compliance with this order. Prior to filing, such report shall be served upon the plaintiffs and the United States of America.

5. The court reserves jurisdiction herein to enter such further orders as may be necessary and appropriate.

This 9th day of January, 1959.

/s/ Jno E. Miller
United States District Judge

* * *

REPORT AND MOTION OF DEFENDANTS LITTLE ROCK SCHOOL DISTRICT AND THE MEMBERS OF THE BOARD OF DIRECTORS THEREOF

Pursuant to the order of this Court dated January 9, 1959, the defendants, Little Rock School District and the members of the Board of Directors thereof (hereinafter called "defendants"), submit the following report and motion for the relief requested herein:

Immediately upon receipt of the said order of this Court of January 9, 1959 and the accompanying opinion of the Court, which were available for consideration the first part of last week, the defendants and their counsel began a careful analysis and study thereof. It appears to the defendants and their counsel that the language of the order and the construed effect thereof appear to offer a way for these defendants to proceed, both with dignity to our people and with respect to the authority of the Court, to sincerely explore possible acceptable solutions to the present impasse.

[*Blossom Plan Impossible*]

With some schools closed and with an air of tenseness encompassing the whole School District, the defendants have concluded, only that which has long been evident, that it is impossible under the circumstances for the defendants to carry into effect the so called "Blossom Plan".

If the defendants, as a new School Board, can be allowed to proceed with dignity in an atmosphere of calmness in which the Court and

all citizens of the District can at all times be considered, apprised and taken into complete confidence, the defendants are both willing and anxious to honestly and sincerely explore with deliberate speed all avenues which may lead to a lasting solution acceptable to this Court, under governing constitutional standards as interpreted by the Supreme Court of the United States, and to all people of this District.

Calmness can only be restored by returning to the Little Rock School District its schools and by returning to the defendants the full responsibility for the operation thereof which they have never yet had. Those who invoke the jurisdiction of this Court and who seek affirmative relief therefrom must do equity as well as request equity. Our study of the situation to date reveals that most white high school children in the District are being schooled. On the other hand, our study reveals that most of the negro high school children are not—it is only equity to permit them to return to school. Under the existing circumstances, as reflected by the study of this Board, this can be accomplished only if the following relief is granted to these defendants.

[*Motion*]

Accordingly, the defendants respectfully move for this Court to enter an order granting the following relief:

1. Permitting these defendants to operate all closed schools, including specifically the new Horace Mann High School for negroes, on a segregated basis.

2. Permitting these defendants to petition the Governor of the State of Arkansas to return the closed schools to the jurisdiction of this Board so that the defendants may open and operate them on a segregated basis.

3. Permitting these defendants, if the petition to the Governor of the State of Arkansas is successful, to open and operate the closed schools on a segregated basis at the earliest possible time, in order that schooling will be available for the next term of school of the Little Rock School District which begins January 26, 1959.

4. If the above relief is granted, authorizing these defendants to undertake and complete a study of all problems and conditions existing in and with reference to the operation of a successful public school system in this District under governing constitutional standards as interpreted by the Supreme Court of the United States to the end of developing an acceptable plan and reporting back to this Court no later than August 15, 1959.

[*Good Faith Alleged*]

We respectfully call the Court's attention to the fact that these defendants, who have been in office only since December 16, 1958, have acted in good faith and with all deliberate speed in making this report and requesting the above relief, and that the defendants have not used the thirty days granted by this Court. If this report is approved and the relief requested herein granted, the defendants will immediately undertake in sincerity and good faith to develop a plan or plans acceptable to the Court, under governing constitutional standards as interpreted by the Supreme Court of the United States, and to the people of this District. In this regard, the defendants have already contacted and made arrangements to employ an expert in the public education field to immediately undertake a study and analysis of the situation. And, the defendants will employ such other experts as can aid in exploring all avenues of the situation which may be helpful in arriving at an acceptable solution.

Pursuant to the Court's order, we have served copies of this report and motion upon the plaintiffs and the United States of America, and the defendants respectfully request that the Court consider the report and grant the defendants a hearing on the motion for relief at the earliest possible time.

This 21st day of January, 1959.

Respectfully submitted,
/s/ Ed. I. McKinley, Jr.
/s/ Everett Tucker, Jr.
/s/ Ben D. Rowland, Sr.
/s/ Russell H. Matson, Jr.
/s/ Robert W. Laster
/s/ Ted L. Lamb
Members of the Board of Directors
Little Rock School District
MEHAFFY, SMITH & WILLIAMS
11th Floor, Boyle Building
Little Rock, Arkansas
ATTORNEYS FOR THE ABOVE NAMED DEFENDANTS
/s/ Herschell H. Friday, Jr.

* * *

PLAINTIFFS' RESPONSE TO REPORT AND MOTION OF DEFENDANTS

Come the plaintiffs, by their attorneys, and submit herein their response to the Report and Motion of Defendants, Little Rock School District, and the Members of the Board of Directors Thereof, which was filed in this cause on January 21, 1959.

The Judgment of the District Court dated January 9, 1959 provided in part as follows:

> 3. That the said defendants are further directed, in accordance with the said mandate, to move forward within their official powers to carry out the integration plan, and to take affirmative steps on their own initiative consistent with their official powers to facilitate and accomplish the operation of the Little Rock School District on a non-discriminatory basis.
>
> 4. That within thirty days from the date hereof said defendants shall submit to the court a specific and detailed report of the affirmative steps they have taken and propose to take in compliance with this order . . .

The Report filed by the defendants is not in compliance with the express orders of this Court as the defendants seek to move backward rather than forward in carrying out the integration plan. The proposals made by the defendants do not comply with the Mandate of the United States Court of Appeals for the Eighth Circuit which was filed herein December 4, 1958.

[*"Temporary Delay"*]

Not only is the Report not in compliance with the Mandate of the United States Court of Appeals and of the Judgment of this Court dated January 9, 1959, but the relief now sought by the defendants raises the same issues which were disposed of by the opinion of the Court of Appeals dated August 18, 1958, 257 F.2d 33 which was affirmed by the Supreme Court of the United States in an opinion dated September 29, 1958, 358 U.S. 1, 79 S.Ct. —, 3 L.Ed. 2d 1. The defendants sought a "temporary delay" in the hearings before Judge Lemley last June and the Court of Appeals in reversing the order of the District Court, stated:

> "An impossible situation could well develop if the District Court's order were affirmed. Every school district in which integration is publicly opposed by overt acts would have "justifiable excuse" to petition the courts for delay and suspension in integration programs. An affirmance of "temporary delay" in Little Rock would amount to an open invitation to elements in other districts to overtly act out public opposition through violent and unlawful means."

[*Supreme Court Decision*]

The Supreme Court of the United States deemed it important to make prompt announcement of its affirmance of the August 18, 1958 opinion of the Court of Appeals, and issued a *per curiam* opinion on September 12, 1958, in which it stated:

> "It is accordingly ordered that the judgment of the Court of Appeals for the Eighth Circuit dated August 18, 1858, reversing the judgment of the District Court for the Eastern District of Arkansas, dated June 20, 1958, be affirmed, and that the judgments of the District Court for the Eastern District of Arkansas, dated August 28, 1956, and September 3, 1957, enforcing the School Board's plan for desegregation in compliance with the decision of this Court in Brown v. Board of Education, 347 U.S. 483, 349 U.S. 294, be reinstated."

The senior public high schools of Little Rock have never re-opened since the hearings on the Board's request for delay last summer and the factual situation remains unchanged and this Court is therefore bound by the decree of the Supreme Court as the law of the case and cannot give the relief now sought by the defendants.

Wherefore, plaintiffs pray that the Report of the Defendants be rejected by the Court as not being in compliance with the Judgment dated January 9, 1959, and that the relief sought by the defendants be denied.

Respectfully submitted,
/s/ Wiley A. Branton
119 East Barraque Street
Pine Bluff, Arkansas
Thurgood Marshall
10 Columbus Circle
Suite 1790
New York 19, N. Y.
Attorneys for Plaintiffs

* * *

ORDER CONVENING
THREE-JUDGE COURT

The above named plaintiffs having filed suit which is now pending in the above entitled court, seeking temporary and permanent injunction against the defendants in said suit, enjoining, suspending and restraining said defendants from enforcing or instituting proceedings to enforce certain Acts of the Legislature of the State of Arkansas, on the grounds, among others, that said statutes are violative of certain provisions of the Constitution of the United States; and said application for temporary and permanent injunction having been presented to the Honorable John E. Miller, United States District Judge for the Western District of Arkansas (sitting in the Eastern District by Assignment), and said Judge having notified the Chief Judge of the United States Court of Appeals for the Eighth Circuit thereof;

IT IS NOW HERE ORDERED that Honorable John B. Sanborn, United States Circuit Judge, and Honorable Axel J. Beck, United States District Judge for the District of South Dakota (sitting in the Eastern District of Arkansas by assignment), be and they hereby are designated to sit with the above named Honorable John E. Miller, United States District Judge for the Western District of Arkansas, (sitting in the Eastern District by assignment as aforesaid), to hear and determine said action and proceeding.

Dated this 22nd day of January, A. D. 1959.

/s/ Archibald K. Gardner
Chief Judge, United States
Court of Appeals, for the
Eighth Circuit.

EDUCATION
Public Schools—Florida

Theodore GIBSON, as next friend for Theodore R. Gibson, Jr., et al. v. BOARD OF PUBLIC INSTRUCTION OF DADE COUNTY, FLORIDA, et al.

United States District Court, Southern District, Florida, Miami Division, December 22, 1958, No. 6978-M-Civil.

SUMMARY: Negro school children in Dade County, Florida, in June, 1956, filed a class action in federal district court against county school officials to have sections of the state constitution and statutes requiring racial segregation in public schools declared to be in violation of the Fourteenth Amendment. Plaintiffs also prayed for an order requiring prompt presentation of a school desegregation plan and for an injunction against regulating school attendance on the basis of race. Plaintiffs alleged that a previous petition to abolish such segregation had been refused by defendants, who continued to enforce a 1955 Board resolution providing for continued maintenance of the schools on a non-integrated basis. The court dismissed the action on the ground that none of the plaintiffs had sought or been denied admission to a particular school by school officials, 2 Race Rel. L. Rep. 9 (S.D. Fla. 1956). The Court of Appeals for the Fifth Circuit reversed and remanded, holding that plaintiffs were not required to show such applications, which would have been futile in view of defendants' resolute enforcement of an over-all policy of non-integration, and that consideration of the effect of the Florida Pupil Assignment Law (1 Race Rel. L. Rep. 924), enacted in July, 1956, after this suit was filed, would be premature. 246 F.2d 913, 2 Race Rel. L. Rep. 784 (5th Cir. 1957). On remand, the district court declared the state school segregation requirements unconstitutional. However, it was held that the Assignment Act, not here challenged and presumedly constitutional since it lacks reference to race, met plaintiffs' demand for a prompt desegregation plan. The court also denied injunctive relief on the grounds that the 1955 Board resolution complained of had been superseded by an August,

1956, resolution implementing the Assignment Act, under which defendants had ever since acted, and that plaintiffs had not availed themselves of administrative remedies provided by that Act. The district court opinion and order follow:

LIEB, District Judge:

The Plaintiffs are six Negro children of public school age, citizens of the United States and of the State of Florida, all of whom reside in Dade County, Florida. On June 12, 1956, they filed this suit by their respective parents as next friends, as a class action, against the Defendants, C. Raymond Van Dusen, E. L. Alsworth, Robert S. Butler, Helen Vosloh and Anna Brenner Meyers, as members of the Board of Public Instruction of Dade County, Florida, hereinafter referred to as the "Board", and W. R. Thomas, Superintendent of the Public Schools of Dade County, Florida. In their Complaint the Plaintiffs prayed for a declaratory judgment that Article 12, Section 12, of the Constitution of the State of Florida and Section 228.09, Florida Statutes Annotated, each violate the Fourteenth Amendment to the Constitution of the United States in that they require racial segregation in the public schools of Florida and they claimed that these invalid measures were being enforced by the Defendants to the irreparable damage of the Plaintiffs.

[*Desegregation Plan Prayed*]

Plaintiffs also prayed for an order of the Court requiring Defendants to promptly present a plan of desegregation of the public schools of Dade County, and for an injunction restraining and enjoining the Defendants, and each of them, from requiring these Plaintiffs and all other Negroes of public school age to attend or not to attend public schools of Dade County because of race.

The Complaint further alleges that on September 7, 1955, Plaintiffs petitioned the Defendant Board to abolish racial segregation in the public schools of Dade County as soon as practicable, but the Board had not done so but was continuing to enforce a certain resolution of the Board adopted on August 12, 1955, providing for the continued maintenance of the said schools on a non-integrated basis.

The Defendant Board is a corporation under the provisions of Section 230.21 Florida Statutes Annotated. Since this suit was filed, two new members, Mrs. Lyle Roberts and S. D. Phillips, Jr., have been added to the Board, all other members remaining. Also since the suit was filed Dr. Josiah Calvin Hall has replaced the Defendant W. R. Thomas as Superintendant of the Public Schools of Dade County.

The Complaint was amended several times, after which a Motion to Dismiss for failure to state a claim was granted by the District Court. On Appeal to the Fifth Circuit Court of Appeals, the decision of the District Judge was reversed [1] on the ground that so long as the requirement of segregation in the public schools of the County existed, it was not necessary for Plaintiffs to apply for admission to any particular school and it was premature to consider the effect of the newly enacted (since the suit was filed) Florida Pupil Assignment Law [2] which provides for assignment and reassignment of pupils to the public schools of the State.

[*Defendants' Answer*]

The Defendants then answered the Complaint denying that Plaintiffs were entitled to maintain the suit as a class action and denying that Plaintiffs were deprived of their rights to attend the public schools of the County because of their race. The Answer admitted that Article 12, Section 12, of the Florida Constitution and Section 228.09, Florida Statutes Annotated, purport to require racial segregation in the schools, but Defendants agreed that these provisions were rendered void and of no effect by virtue of the decision of the Supreme Court of the United States in Brown vs. Board of Education of Topeka, Kansas,[3] and contended that Defendants no longer followed or enforced them. Defendants further admitted in their Answer that the Board had adopted the said Resolution of August 17, 1955, and that it had been followed and enforced in the operation of the schools of the County during the school term of 1955-56, but contended that since the passage of the Pupil Assignment Law by the Legislature of Florida in July, 1956, the Board had promptly adopted its Resolution of August

1. Gibson v. Board of Public Instruction of Dade County, 5 Cir., 1957, 246 F.2d 913
2. Section 230, 232, Florida Statutes Annotated
3. Brown v. Board of Education of Topeka, 1954, 347 U.S. 483

24, 1956, which implemented the Pupil Assignment Law, superseded the previous Resolution complained of, and provided that thereafter all assignments of pupils would be made by the Board pursuant to the provisions of the said Pupil Assignment Law. Defendants further claimed that in assigning all pupils to schools since August 17, 1956, they have followed and enforced only the provision of the Pupil Assignment Law and the implementing Resolution of the Board adopted August 24, 1956.

[*Heard Without Jury*]

The evidence presented by the parties was heard by the Court without a jury. At the conclusion of the hearing the Court reserved decision. Briefs were filed by both sides and were duly considered by the Court.

Plaintiffs are entitled to bring action for declaratory relief as a class suit, and the objections of Defendants to such procedure is without merit.[4]

Article 12, Section 12, of the Constitution of the State of Florida is a part of the Constitution adopted in 1885 and provides as follows:

> "White and colored children shall not be taught in the same schools, but impartial provision shall be made for both."

Section 238.09, Florida Statutes, was adopted in its present form as a part of Chapter 19355, Laws of Florida 1939 and provides as follows:

> "The schools for which children and the schools for Negro children shall be conducted separately. No individual, body of individuals, corporation, or association shall conduct within this State any school of any grade (public, private, or parochial) wherein white persons and Negroes are instructed or boarded in the same building or taught in the same classes or at the same time by the same teachers."

[*Florida Laws Unconstitutional*]

Article 12, Section 12, of the Florida Constitution and Section 228.09, Florida Statutes Annotated, obviously violate the provisions of the Constitution of the United States under the decision of the Supreme Court in the Brown case. All parties concede this fact. A three-judge court, in this case, is not required.[5]

Plaintiffs are entitled to have a judgment by the Court in this suit declaring that the said Article 12, Section 12, of the Constitution of Florida, and the said Section 228.09, Florida Statutes Annotated, are each invalid and unenforceable.

[*Pupil Assignment Law*]

As to the prayer of the Complaint that the Court order the Defendants to promptly present a plan of desegregation of the schools, the Court finds that the Florida Pupil Assignment Law enacted by the Legislature of Florida since the filing of this suit meets the requirements of such a plan and the demands of the Plaintiffs. That Act provides a comprehensive plan and directive for the enrollment and assignment of all pupils in the public schools by the Boards of Public Instruction of the several counties and for appeals from such decisions made by the Boards, all on an individual basis. No reference whatever is made in the Act to consideration of race or color of the pupils.

Plaintiffs made no challenge to the validity of the Pupil Assignment Law. It, therefore, enjoys a presumption of validity as a State Statute. Defendants as state officials are required to follow the provisions of the State laws until they are repealed; superseded or held invalid by the Courts.

[*Injunction Denied*]

The Plaintiffs have failed to show their right to an injunction at this time. When the suit was filed, segregation of the races in the schools was required and enforced under the provisions of the State Constitution, and the Statute and Resolution of the Board heretofore referred to. But within three months after the filing of this suit and before the opening of the next school term, the State Legislature passed the Pupil Assignment Law and the Board adopted its implementing resolution thereto, providing for the assignment by the Board of all pupils under the authority and provisions of the Pupil Assignment Law. The evidence shows that since the adoption of the said implementation resolu-

4. Orleans Parish School Board v. Bush, 5 Cir., 1957, 242 F.2d 156

5. Bush v. Orleans Parish School Board, E.D.La., 1956, 138 F.Supp. 337; Carson v. Warlick, 4 C.C.A., 1956, 238 F.2d 724; Kelly v. Board of Education of the City of Nashville, M.D., Tenn., 1956, 139 F.Supp. 578

tion of the Board on August 24, 1956, all assignments and reassignments of pupils to schools in the County have been made by the Board itself purporting to act under the said implementation resolution and the Pupil Assignment Law. The evidence further shows that during that period several of the Plaintiffs themselves made application to the Superintendent of Schools under the law for changes in their school assignments. These requests were denied by the Superintendent and the Plaintiffs involved took their appeals under the law to the Board which promptly set dates for hearings on these appeals. Before the hearings could be had, the Plaintiffs withdrew and abandoned their appeals. The Board has not attempted at any time to enforce Article 12, Section 12, of the Constitution, or Section 228.09, Florida Statutes Annotated, or the resolution of the Board adopted August 13, 1955, after August 24, 1956, and since the said Constitutional provision and the said Statute are now declared to be invalid and unenforceable, there remains only the Florida Pupil Assignment Law governing the actions of the Defendants in the matter of assignment of pupils to schools of the County. This being the unchallenged law of the State, it must be followed by the Plaintiffs and Defendants alike. If in the enforcement of the provisions of that Act, the Defendants or any of them should violate the provisions of the law or should require anyone to attend or not to attend the public schools of the County because of race, the parent or guardian of the child affected by such conduct may ask for a review of such decision by the State Board of Education and then appeal to the Courts. This procedure is available only on an individual basis and is not available by class action.

[*Shuttlesworth Decision Cited*]

The recent decision of the Supreme Court of the United States rendered on November 24, 1958, affirming the decision of a three-judge court in the Alabama case of Shuttlesworth v. Birmingham Board of Education[6] supports this conclusion.

In that case, four Negro pupils brought a class action in the United States District Court to enjoin the Birmingham, Alabama, Board of Education from enforcing the Alabama School Placement Law and from refusing on the basis of race or color to permit the Plaintiffs and others similarly situated to attend or transfer to public schools closer to their respective homes than the schools to which they were then assigned. Judge Rives, of the Fifth Circuit Court of Appeals, presided over the three-judge court and wrote the opinion which the Supreme Court later affirmed in all respects.

The three-judge court held that the challenged School Placement Law of Alabama was not invalid upon its face and that "it furnished the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color."

[*Florida and Alabama Laws Similar*]

It is noted that the provisions of the Alabama School Placement Law are similar in all material respects to those of the Florida Pupil Assignment Law, both of which were modeled after the North Carolina Pupil Placement Act.

The three-judge court in the Birmingham case also denied all injunctive relief to the Plaintiffs and left them to the fair operation of the School Placement Law and the remedies therein provided. The Court in that case was likewise considering the issue raised by the Complaint as a basis for the application for an injunction that despite the passage of the Pupil Placement Law, Negro students were still being assigned to the same schools on a basis of segregation of the races irrespective of the nearness of other public schools to the homes of the Plaintiffs.

[*Administrative Remedies Available*]

In that case also, the opinion shows that the School Board had refused to render any opinion or take any action upon tests given by the Board to Plaintiffs as a basis of assignment under the Act. It has already been noted that in the present case, the Plaintiffs themselves refused to proceed with clearly available procedure offered under the Florida law for relief from adverse decisions of the school authorities.

In denying the injunction in the Birmingham case, the three-judge court pointed out that any complaints of improper administration of the School Placement Law should be tested by the Courts only after exhaustion by the pupil or parent of the administrative remedies provided by the State law, and quoted from an opinion

6. Shuttlesworth v. Birmingham Board of Education, Ala., 1958, 162 F.Supp. 372

of the late great Chief Judge Parker, of the Fourth Circuit Court of Appeals, in a similar case, Carson v. Warlick: [7]

> "Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed that these will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied to and have failed to give relief, should the Courts be asked to interfere in school administration."

The Plaintiffs now have available to them adequate remedies under the Pupil Assignment Law for any of their grievances pleaded in the Complaint. The record shows that they have not pursued them and until they do so and have been denied their rights they are not entitled to injunctive relief.

An appropriate order will be entered herein in conformity with this Memorandum Opinion.

Dated at Miami, Florida, this 22 day of December, A.D. 1958.

ORDER

THIS CAUSE came on to be heard by the Court without a jury. The Court having heard the evidence and considered the arguments of counsel and their briefs submitted, has this day filed a Memorandum Opinion herein. In conformity with the said Memorandum Opinion, it is hereby

ORDERED, ADJUDGED and DECREED;

1. That the prayer of the Plaintiffs in their Complaint for a declaration by the Court that Article 12, Section 12, of the Constitution of the State of Florida, and Section 228.09, Florida Statutes Annotated, each violate the provisions of the Fourteenth Amendment to the Constitution of the United States is hereby granted and this Court does hereby find and declare that the said Article 12, Section 12, of the Constitution of the State of Florida, and Section 228.09, Florida Statutes Annotated, and each of them violate the provisions of the Fourteenth Amendment to the Constitution of the United States and are void and of no effect. It is further

ORDERED, ADJUDGED and DECREED that the several prayers of the Plaintiffs for other and further relief as prayed for in the Complaint herein be, and the same are hereby, each denied for the reasons set forth in the above referred to Memorandum Opinion.

DONE and ORDERED in Chambers at Miami, Florida, this 22nd day of December, A.D. 1958.

7. Carson v. Warlick, 4 C.C.A., 1956, 238 F.2d 724

EDUCATION
Public Schools—Maryland

BOARD OF EDUCATION OF ST. MARY'S COUNTY, G. Edward Thomas, et al., constituting the Board of Education of St. Mary's County, and Robert E. King, Jr., Superintendent of Schools of St. Mary's County v. Joan Elaine GROVES, Minor, by her parent, William Groves.

United States Court of Appeals, Fourth Circuit, November 13, 1958, 261 F.2d 527.

SUMMARY: A suit to desegregate the public schools of St. Mary's County, Maryland, was dismissed in July, 1956, by the federal district court in Maryland because the plaintiff Negro school children had not exhausted their state administrative remedies. *Robinson v. Board of Education of St. Mary's County*, 143 F.Supp. 481, 1 Race Rel L. Rep. 862 (Md. 1956). Subsequently, the Board of Education of St. Mary's County declared that integration would begin with the school year 1957-1958 "on a voluntary basis, in the elementary grades, where it is administratively feasible." Two Negro children who had been attending a segregated

school applied for transfer to a previously "white" high school, but their requests were denied by the county superintendent of schools. Their appeal to the State Board of Education was dismissed on February 26, 1958, because not filed within the period required by statute, the Board noting that it would have dismissed in any event because the superintendent had acted in good faith in carrying out the integration policy of the county board. *Groves v. Dent*, 3 Race Rel. L. Rep. 559 (1958). Suit was brought in the federal district court for Maryland on April 11, 1958, to secure admission of the two Negro children to the ninth and eleventh grades respectively of the "white" high school and to secure similar relief for others of their class. Prior to trial the County Board announced that for the school year 1958-1959, integration would be extended on a voluntary basis through grades seven, eight, and nine, and one plaintiff was notified that he would be admitted to the ninth grade of the "white" high school. The court held that the school officials had not shown sufficient justification for denying to the eleventh grade applicant the constitutional rights for which she had applied; it added, however, that these conclusions were reached "without disapproving the overall plan, and without prejudice to defendants' right to offer a plan as a defense if additional applications are filed." *Groves v. Board of Education of St. Mary's County*, 164 F. Supp. 621, 3 Race Rel. L. Rep. 910 (Md. 1958). The school officials appealed, contending that the district court order unjustifiably interfered with their orderly desegregation plan, because making exception to a reasonable plan for a single child opens the way to thwarting gradual integration plans in every case in which the number of Negroes seeking admission to a public school is small. However, the Fourth Circuit Court of Appeals affirmed, stating that whereas a district judge should not take the formulation of an integration plan from the hands of school authorities, he must determine whether a proposed plan is reasonable, and therefore has discretion to make exceptions "whenever a reasoned plan bears with unusual hardship on a particular individual." With integration of the tenth, eleventh and twelfth grades contemplated for the fall of 1959, the court ruled that it was not unreasonable to admit one Negro girl to one of those grades now.

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

PER CURIAM.

This is an appeal from a decree of the District Court which directed the Board of Education of St. Mary's County, Maryland, to permit one Negro child, Joan Elaine Groves, to attend Great Mills High School which was maintained for white children in that county. The same decree dismissed as moot an application on behalf of Thomas Conrad Groves, the brother of Joan, to be permitted to attend the same high school because the Board, a few days before the institution of the suit, had opened the seventh, eighth and ninth grades of the school to Negroes. The suit had been instituted on April 11, 1958, by William Groves, the father of the minor children, to secure the admission of his daughter to the eleventh grade and of his son to the ninth grade of the high school. He was dissatisfied with the services rendered to his children at the Jarboesville school, a consolidated elementary and junior-senior high school for Negroes, which his children had previously attended under the existing rules of the Board.

[*History of Litigation*]

The suit was brought as part of the effort of certain Negro citizens in St. Mary's County to secure admission to the public schools of the county on an integrated basis. The history of this activity is set out in the opinion of Judge Thomsen in Robinson v. Board of Education of St. Mary's County, D.C.Md., 143 F.Supp. 481, which was instituted on March 16, 1956, and in the opinion in the pending case which was filed August 28, 1958, 164 F.Supp. 621. From these opinions it appears that on June 20, 1955, after the decisions of the Supreme Court in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 and 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, the County Board of Education and the County Commissioners appointed a Citizens Committee to advise the school authorities in the formulation of a plan to abolish racial discrimination in the public schools of the county. After a conscientious study of the problem during the ensuing year the Committee made a final report on June 11, 1956, in which it recommended a plan for permitting integra-

tion in the elementary public schools on a voluntary basis beginning September, 1957. This plan was accepted by the Board of Education on July 31, 1956, in a resolution which declared that integration would begin with the 1957 school year in the elementary grades where administratively feasible.

In September 1956, thirty-one Negro children applied for admission to white public schools but their applications were denied. No appeals from this action were taken. During the year 1957, applications were made on behalf of four Negro children to be transferred to elementary grades in white schools, and on behalf of three Negro children, including the Groves children, to be transferred to high school grades. The requests for transfer to the elementary grades were granted but those for transfer to high school grades were denied. However, none of the four children whose requests were granted entered the white schools and an appeal by the father of the Groves children to the State Board of Education was denied. The appeal to the State Board was not filed within the time fixed by the statute and was accordingly dismissed, but the Board stated that if the appeal had been seasonably taken it would have been dismissed because the school authorities were acting in good faith pursuant to the policy promulgated by them, and because the question of whether the policy contravenes the constitutional right of the children in denying admission to the high school was a legal question not within the powers of the State Board to decide.

[*Pending Action Instituted*]

Finally, on April 11, 1958, the pending action on behalf of the Groves children was instituted and, as we have seen, Thomas Conrad Groves was admitted to the ninth grade of the white high school, in accordance with the plan adopted by the School Board, and the admission of Joan Elaine Groves to the eleventh grade of the high school was ordered by the District Judge against the opposition of the Board of Education. The Board opposed the admission of Joan Elaine Groves because in the course of its gradual integration of the schools in the county it had not reached the point at which it thought it wise to open the tenth, eleventh and twelfth grades of the white high school to Negro students. At the same time the Board announced that it would probably extend the plan of integration to include the tenth, eleventh and twelfth grades of the high school at the school session to begin in September, 1959.

[*District Court Opinion*]

Taking all of these facts into consideration the District Judge said:

> "This court held in the Robinson case, 143 F.Supp. at page 492, that St. Mary's County had made a prompt and reasonable start toward compliance with the Supreme Court's ruling. The plan of desegregation which it has adopted appears to proceed with more than 'deliberate' speed. But such a plan cannot be considered in the abstract, apart from the particular facts of each case. A delay which might be necessary to permit the solution of administrative problems created by the transfer of a considerable number of students is not justified in this case where only two Negro students are applying for admission to a white school, where one has been accepted into a grade which has already been desegregated, and it is hoped to desegregate the remaining grades next year. The order of the State Board, read in connection with the opinion in the Robinson case, indicates that the State Board found no administrative problem justifying the denial of the applications filed on behalf of the two Groves children. The State Board evidently regarded the case as raising only a legal question of constitutional rights.
>
> "The second opinion of the Supreme Court in the Brown case, 349 U.S. at pages 300, 301, 75 S.Ct. [753], at page 756, requires district courts to weigh the equities and to adjust and reconcile public and private needs. I do not question the good faith of the defendants in adopting the plan of desegregation nor their sincere belief that a further delay in the complete desegregation of the high schools is desirable. But constitutional rights are personal, and if Joan Elaine Groves does not receive a desegregated education at this time, she never will. Her rights and her needs cannot properly be postponed simply because the County Board and certain members of the community think it would be wiser to delay desegregation of the three highest grades. Without disapproving the overall plan, and

without prejudice to defendants' right to offer the plan as a defense if additional applications are filed, I conclude that defendants have not shown any legally sufficient justification for denying to the infant plaintiff, Joan Elaine Groves, the constitutional right for which she has applied." [164 F.Supp. 625.]

[*Unjustified Interference Charged*]

It is contended that the order of the court constitutes an unjustified interference with the orderly plan of desegregation of the public schools adopted in good faith by the School Board of St. Mary's County. It is pointed out that the Supreme Court in the second Brown case, 349 U.S. 294, 299, 75 S.Ct. 753, held that school authorities have the primary responsibility of solving the problems caused by the integration of schools theretofore conducted on a segregated basis and that the courts must consider whether the action of the school authorities constitutes good faith implementation of the governing constitutional principles; and that if a reasonable start to this end is made in good faith and carried on with deliberate speed, additional time may be allowed to complete the change when it becomes necessary in accommodating the constitutional rights of the individual students with the protection of public interests. With these considerations in mind it is argued that if an exception to a reasonable plan in the case of a single child is allowed to stand, it will open the way to thwart the gradual integration of the public schools in every community where the number of Negroes seeking admission is small. In short, the contention is that the courts have no discretion to make exceptions to a plan formulated by the school authorities in good faith.

[*Contention Rejected*]

We are unable to accept this argument. Undoubtedly the District Judge should not take the formulation of a plan for the integration of the schools out of the hands of the school authorities but, on the other hand, he may not disregard his own responsibility to determine not only whether a plan is offered in good faith but whether it is reasonable in all its aspects; and this includes the duty to determine whether an exception to the plan in a given case should be made. Not infrequently such a decision must be made in every field of human activity whenever a reasoned plan bears with unusual hardship on a particular individual. We are unable to say that the District Judge, whose opinions in the St. Mary's County cases indicate that he has given meticulous study to the local situation, was wrong in this instance. We stress the passage in the concluding part of his opinion in the pending case where he expresses no disapproval of the general plan and reserves to the School Board the right to offer its plan as a defense if additional applications in conflict therewith are filed.

His decision in this case is quite similar to his decision in Moore v. Board of Education of Harford County, Maryland, D. C., 152 F.Supp. 114, affirmed by this court in Slade v. Board of Education, 252 F.2d 291, where he held that the School Board of the county was not generally estopped from modifying and narrowing an announced policy of integration but excepted from his order the case of two children who had been influenced by the first resolution not to press their individual rights.

It cannot be said to be arbitrary and unreasonable to admit Joan Elaine Groves to the twelfth grade of the Great Mills High School of St. Mary's County for her last year of public school education, in view of the fact that her brother has already been admitted to the ninth grade of the same school, and that the School Board now contemplates the integration of the tenth, eleventh and twelfth grades at the opening of the schools in the fall of 1959. It is conceded that no administrative difficulties have been caused by admission under the decision of the District Judge in this case.

Affirmed.

EDUCATION
Public Schools—Virginia (Alexandria)

Otis E. JONES, et al. v. the SCHOOL BOARD OF ALEXANDRIA, Virginia, a body corporate, and T. C. Williams, Division Superintendent of Schools of the City of Alexandria, Virginia.

United States District Court, Eastern District, Virginia, Alexandria Division, February 6, 1959, Civil Action No. 1770.

SUMMARY: Fourteen Negro children applied to Alexandria, Virginia, school officials for transfers to previously all-white schools, and instituted a suit in federal district court to compel their admission. Subsequently, the court ordered that execution of Pupil Placement forms for some of the children would not prejudice their rights under the suit. Defendants' motion to dismiss was denied, and trial was set for October 30, 1958, but on October 28 the case was continued pending disposition of plaintiffs' motion for summary judgment. Also on October 28, defendant school board adopted a resolution embodying an assignment plan setting forth six criteria for passing on transfer applications. On January 22, 1959, the Board rejected all 14 applications on one or more of the criteria: Emotional stresses on the applicants, residence closer to the schools now attended, academic level below the average in, or overcrowded conditions of, schools to which transfers were sought. On January 23, the court granted summary judgment for plaintiffs based on findings that defendants were pursuing a policy of racial segregation against plaintiffs, in denial of due process and equal protection of the laws and contrary to a federal civil rights statute. Therefore, the court enjoined defendants from refusing to admit any child from a school on account of race or color. On plaintiffs' motion for further relief, the court on February 4 ordered defendants not to refuse to admit nine named plaintiffs to specified "white" schools on February 10. The court on February 6 issued its findings of fact and conclusions of law. The Board's criterion of "mental or emotional stability" of the applicant, which had been invoked in every rejection, was discarded by the court as not apposite to any of the applicants under the evidence. However, there being evidence that three applicants live nearer their present school than to the one to which admission was sought and that two others are academically below the average of the schools to which they sought admission, the court did not disturb the ruling of the board in those cases. As to the remaining nine, the court found no basis other than race for their rejection. Request by defendants that admission of the latter nine be deferred until September, 1959, was rejected by the court because that would result in requiring a new administrative, and possibly judicial, review. A motion to modify the order was denied. The orders protecting plaintiffs' rights from prejudice, denying motion to dismiss, and continuing the trial, the school board resolution, the orders granting the injunction and further relief, the findings of fact and conclusions of law, and the order denying the motion to modify follow.

BRYAN, District Judge.

ORDER

Upon further consideration in the above-entitled cause and the execution and delivery to defendants by Mrs. George Turner and Mrs. Hazel Lomax of "Application for Placement of Pupil" forms, prescribed by the Pupil Placement Board of the Commonwealth of Virginia, in behalf of their respective children, infant plaintiffs Gerald R. Turner and Margaret Irene Lomax, as a condition precedent to the admission and enrollment of said infant plaintiffs in the Lyles-Crouch and Charles Houston Elementary Schools, respectively, without prejudice, pending the further order of this Court, it is by the Court, this 16th day of September, 1958

ORDERED, that the execution and delivery of the "Application for Placement of Pupil" forms, as aforesaid, shall be and is without prejudice to or waiver of any and all rights, claims, defenses, or contentions which the said plaintiffs have heretofore or hereinafter may assert in the further prosecution of this cause.

September 16, 1958.

ORDER

This cause came on for hearing upon the motion filed by defendants to dismiss the complaint herein and, upon consideration of the complaint, said motion, the memoranda of points and authorities submitted by counsel for the respective parties, and argument by counsel for defendants, it is, by the Court, this 22nd day of October, 1958, ORDERED:

1. That defendants' motion to dismiss the complaint herein be and it is hereby denied.

2. That the cause be set down for trial on October 30, 1958, at 10:00 am, upon the complaint, answer, and such further pleadings and/or pre-trial stipulations as may be filed herein before trial.

October 22, 1958.

ORDER

Upon consideration of the oral motion by counsel for plaintiffs and defendants, it is by the Court this 28th day of October 1958,

ORDERED that the trial in the above-entitled cause, set for 10:00 am on 30 October 1958, be and it is hereby continued generally, pending the hearing and disposition of plaintiffs' pending motion for summary judgment, and

IT IS FURTHER ORDERED that the hearing upon plaintiffs' pending motion for summary judgment be set for the earliest practicable date after 7 November 1958, upon due notice to the parties.

October 28, 1958.

Board Resolution of October 28

Resolution passed by the Alexandria City School Board on October 28, 1958. Meeting held at 8:00 P.M. in the Board Room of the School Board office.

WHEREAS, The School Board of the City of Alexandria, Virginia recognizes that the applications of the fourteen (14) Negro children in the case of Otis E. Jones et al. vs. The School Board of the City of Alexandria, Virginia et al. for placement in certain schools of the city previously attended only by white puplis, as shown on the applications for such placement, together with the desired grade placement in each case, should be acted upon without regard to race or color; and

WHEREAS, The School Board of the City of Alexandria, Virginia realizes that it has the responsibility of treating all public school pupils alike in furnishing them the best possible public educational opportunities, within the ability of the School Board, and to avoid assignment of any child to a grade level or school which does not suit the degree of his present scholastic achievement; and

WHEREAS, The School Board of the City of Alexandria, Virginia further realizes that it must operate all of the schools comprising the city school system with full regard to the proper interests of all pupils and must not burden any class or school by the assignment thereto of more than a just proportion of the total number of public school pupils in the city, in consideration of existing enrollments and of the possibilities of expansion into satisfactory and, at present, unused rooms available within or immediately available to present used quarters:

NOW THEREFORE BE IT RESOLVED THAT: The School Board of the City of Alexandria, Virginia adopt a plan of assignment of those pupils applying for transfer, enrollment or placement in the public schools of the Alexandria, Virginia Public Schools to be administered on a racially non-discriminatory basis in which the following criteria will be considered in making assignment of any such pupil to the public schools of the city.

1. Location of residence of the applicant in reference to the closest school to him of the grade level to which he is eligible, or offering the program needed by him, and in reference to the school which he now attends, if in attendance in the city.

2. The condition of enrollment in the schools involved in the requested transfer, or placement, as to overcrowding or undercrowding, the pupil-teacher ratio of each such school, the ability of each school involved to absorb additional enrollment without overcrowding.

3. Academic achievement and level of men-

tal maturity to be determined by a program of tests which shall be inaugurated and administered by the Superintendent as soon as possible for the current year and between July 15th and August 15th of succeeding years, to all children who apply, or for whom applications are made, for transfers from other schools, either within or without the City of Alexandria, Virginia, or who apply, or for whom applications are made, for initial enrollment in the public schools of the City of Alexandria, Virginia, whose applications involve unusual circumstances; provided, however, that in the cases of the fourteen (14) Negro children whose applications involve the unusual circumstances of seeking transfers to or initial enrollment in public schools of the City previously attended only by children of the opposite race and who have already applied for transfers or initial enrollments, shall be judged in this Number Three Section upon the results of tests which have been given or are being given in the usual course of testing for the current session and provided further, however, that as to all such children so applying, or for whom applications are made, in succeeding years within the time limit fixed by this Board for making such applications, but, too late to be tested by August 15th such tests shall be given within a reasonable time after such applications are made; such tests to be applied and administered according to regular standards on a racially nondiscriminatory basis.

Academic advancement or standing will also be ascertained, in part, by examination of the pupil's cumulative record (if available), report cards and other representative informational material.

4. Health factors which have a bearing on the situation and which influence attendance, alertness, wholesomeness, vigor, mental capacity, association, acceptability or learning ability and retention.

5. Any facts which may be available indicating emotional and social stability, or otherwise, which would in any way affect the acceptability of such transfer.

6. Eligibility as to actual residence, whether living with parents, inlaws, friends or guardians.

7. No pupil affected by the above shall be enrolled in any school except by affirmative act of the School Board, which shall in all cases exercise its proper discretion in making such assignment in view of all pertinent facts, but, without regard to race.

Order Granting Injunction of January 23

This cause came on to be heard on the 14th day of January, 1959 upon the complaint and answer, upon plaintiffs' motion for summary judgment based upon the pleadings, stipulations, admissions, interrogatories and exhibits filed herein, upon the renewal of defendants' motion to dismiss the complaint, and upon defendants' application for the convening of a three-judge District Court, and was submitted without oral argument by counsel.

Upon consideration whereof, the Court finds, concludes, and orders as follows:

1. The Court is of the same opinion as previously stated in denying defendants' motion to dismiss, in that the Pupil Placement Board of the Commonwealth of Virginia is not a necessary or indispensable party to this action and the said motion to dismiss is hereby denied.

2. Virtually the same proposition contained in the motion to dismiss is raised by defendants' application for the convening of a three-judge District Court, but inasmuch as no injunction is asked or required against the enforcement of the Pupil Placement Act or the officials charged with its enforcement in order to afford the relief prayed herein, the Court concludes that no case for the constitution of a three-judge court is presented and the Court will proceed with the consideration and disposition of this case as a single-judge court.

3. From an examination of the complaint and answer, defendants' admissions, defendants' answers to the written interrogatories propounded by plaintiffs, the exhibits, stipulations and other matters of record herein, the Court finds that the following facts are established:

(a) That this Court has jurisdiction of this cause;

(b) That the infant plaintiffs are citizens of the United States and of the Commonwealth of

Virginia, and are residents of and domiciled in the City of Alexandria, Virginia. They are within the statutory age limits of eligibility to attend the public schools of said City, and possess all qualifications and satisfy all requirements for admission thereto, and are in fact attending public schools of said City operated by defendants. All of infant plaintiffs are among those generally classified as Negroes;

(c) That the adult plaintiffs are citizens of the United States and of the Commonwealth of Virginia, and are residents of and domiciled in the City of Alexandria, Virginia. They are parents of the infant plaintiffs, and are taxpayers of the United States and of the said Commonwealth and City. All of the adult plaintiffs are among those generally classified as Negroes.

(d) That this action is properly brought and maintained as a class action by the infant plaintiffs and their parents and guardians on behalf of all other children attending the public schools in the City of Alexandria, Virginia, and their respective parents and guardians, similarly situated and affected with reference to the matters here involved;

(e) That the defendant School Board of the City of Alexandria, Virginia is a body corporate existing pursuant to the Constitution and laws of the Commonwealth of Virginia as an administrative department of the Commonwealth of Virginia. The defendant T. C. Williams, as Division Superintendent of Alexandria City Public Schools, is an administrative officer of the public free school system of Virginia, acting under the authority, supervision and control of, and acting pursuant to the orders, policies, practices, customs and usages of defendant School Board of the City of Alexandria, Virginia;

(f) That the public free schools of the City of Alexandria, Virginia, are under the control and supervision of defendants, acting as an administrative department or division of the Commonwealth of Virginia. Defendant School Board of the City of Alexandria, Virginia, is empowered and required to establish and maintain an efficient system of public free schools in said City; and to carry out the specific powers and duties enumerated in the Code of Virginia, 1950, Title 22, Chapter 6, Article 4, Section 22-97;

(g) That pursuant to a policy, practice, custom and usage of segregation, on the basis of race or color, all children attending the public free schools of the City of Alexandria, defendants, and each of them, and their agents and employees, maintain and operate separate public free schools for Negro children and children who are not Negroes, respectively, and deny infant Negro plaintiffs and all other Negro children, because of their race or color, admission to and education in any public school operated for white children, and compel infant Negro plaintiffs and all other Negro children, because of their race or color, to attend public schools set apart and operated exclusively for Negro children;

(h) That formal applications have heretofore been made to defendants in behalf of the infant plaintiffs for admission to designated public free schools under the jurisdiction and control of defendants, to which said plaintiffs, but for the fact that they are Negroes, in all other respects were qualified and entitled to admission and enrollment. However, defendants, and each of them, have failed and refused to act favorably upon these applications, have continued to enforce and pursue the aforesaid policy, practice, custom and usage of racial segregation against infant plaintiffs, and all other children similarly situated and affected and defendants will continue to pursue said policy, practice, custom and usage against infant plaintiffs and all other children similarly situated and affected and will continue to deny infant plaintiffs admission to or education in any public school operated for children who are not Negroes, unless restrained and enjoined by this Court from so doing.

4. Wherefore, the Court concludes as follows:

(a) That there is no genuine issue as to any material fact in this case;

(b) That the aforesaid action of defendants denies infant plaintiffs, and each of them, their liberty without due process of law and the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States, Section 1, and the rights secured by Title 42, United States Code, Section 1981;

(c) That plaintiffs, and those similarly situated and affected, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the policy, practice, custom and usage, and the actions of the defendants complained of in this cause. Plaintiffs have no plain, adequate, or complete remedy to redress the wrongs and illegal acts of which they com-

plained other than injunctive relief granted by this Court;

(d) That summary judgment should be granted the plaintiffs.

5. Therefore, it is ADJUDGED, ORDERED, and DECREED that effective on and after February 2, 1959, the defendants, their successors in office, agents, representatives, servants, and employees be and each of them is hereby restrained and enjoined from refusing on account of race or color to admit to, or enroll or educate in, any school under their operation, control direction, or supervision, any child otherwise qualified for admission to and enrollment and education in such school.

6. The defendants are directed to report in writing to counsel for the plaintiffs, on or before January 26, 1959, the action they have taken, or will take upon the effective date of the injunction herein, with respect to the pending applications of the infant plaintiffs herein for admission and enrollment in the respective schools designated in their applications, which report shall include the specific reasons for the rejection of any of said applications.

7. The plaintiffs may, upon notice to defendants, at a further hearing in this cause present for consideration and action by the Court their objections, if any there be, to the action taken by the defendants with respect to the pending applications of the plaintiffs for admission and enrollment in the respective schools designated in their applications.

8. Jurisdiction of this cause is retained with the power to enlarge, reduce, or otherwise modify the provisions of said injunction or of this decree, and this cause is continued generally.
January 23, 1959.

Order on Motion for Further Relief

Upon consideration of the motion of the plaintiffs for further relief, filed January 28, 1959, the evidence and counsel's arguments thereon, it is by the court, on its statement of findings of facts and conclusions of law this day filed,

ORDERED that the defendants, their officers, agents and employees, do not refuse admission and enrollment of plaintiffs Kathryn C. Turner, Sandra Turner, Gerald Turner, Jessie Mae Jones and Sarah A. Ragland in either Patrick Henry School or Ramsay School; plaintiffs James E. Lomax and Margaret I. Lomax in Theodore Ficklin School; and plaintiffs Patsy Ragland and James Ragland in Hammond High School, all at the opening of said schools on the morning of Tuesday, February 10, 1959.
February 4, 1959.

Findings of Fact, Conclusions of Law, February 6, 1959

BRYAN, Judge:

The administrative action of the School Board of the City of Alexandria, Virginia in declining the applications of 14 pupils for admission or transfer to certain schools of the city has been reviewed with the following results:

(1) Pupils L, M and N, refused admittance to George Washington High School because their present school, Parker-Gray High, is logically their school by reason of its proximity to their homes, are bound by this determination of the Board, for it is not without substantial evidence to support it;

(2) D and F, refused admission to Patrick Henry or Ramsay School for academic deficiency, are bound by this determination for the same reason; but

(3) The remaining nine applicants should be admitted to the schools they requested, the evidence not giving a basis, other than race, for their rejection.

The criteria formulated and applied by the Board in its ascertainments have been judged by the court in the light of the available decisional law, especially of the Alabama three-judge decision in Shuttlesworth v. Birmingham Board of Education, 162 F.Supp. 372, 384, affirmed November 24, 1958, 358 U.S. 101, by the Supreme Court. The grounds of the present rulings upon each of the applications in suit follow, with the court testing both the validity of the factors em-

ployed by the Board and the adequacy of the evidence before it. Its factors were: (1) "Relation of residence location of the pupil with reference to schools, or school, applied for."; (2) "State of enrollment conditions in the schools concerned in any case, or cases, under discussion."; (3) "Academic achievement and mental capacity as these factors enter into conclusions on requests for entry or transfer."; (4) "Factors involving the health and/or well-being of the applicant which may have a bearing on the request from him."; (5) "Any factors which might affect the mental or emotional stability of the applicant so much as to become pertinent in placement determinations."; and (6) "Is the applicant a bona fide resident of the city and actually entitled to attend school here."

Factors 4 and 6, supra, were not used by the Board at all. Mental or emotional stability, factor 5, invoked by the Board in every case, has been discarded by the court throughout, for under the evidence No. 5 is not apposite to any of the applications. This leaves for consideration Nos. 1, 2 and 3 pertaining, respectively, to residence-school locations, school building capacities and academic-mental attainments.

I (a) *Pupils L, M, and N Are Barred by Geographical Locations*

Students L, M and N were excluded on the geographical criterion. They reside in southeast Alexandria, immediately below Wolfe Street and just east of St. Asaph Street. Presently students in the Parker-Gray High School, they petitioned for George Washington High School. The latter is slightly farther from their homes than is Parker-Gray, and is separated from Parker-Gray by the main line of the railroads splitting the city and running between Washington and the South, as well as by a part of the Potomac Railroad Yards. Parker-Gray is on the east side, that nearer the petitioners' residences. George Washington, to the west, is readily accessible by way of a street underpass.

As no difference in educational facilities between the schools appears, it cannot be said that in assigning these pupils to Parker-Gray, rather than to George Washington, the Board acted arbitrarily or capriciously. This conclusion is not affected by the well-known fact that Parker-Gray has always been a Negro school and George Washington has not previously received Negro students. The ruling of the Board will not be disturbed.

I (b) *A, B, C, D, E, F and K Cannot Be Barred on Geographical Criteria*

A, B, C, D, E, F and K live on Lincolnia Road and Stevenson Avenue. They are in the elementary grades at Lyles-Crouch School; they wish to enter Patrick Henry School. With their residences in the very extreme southwest corner of the city and Lyles-Crouch in the very southeast corner of the city, school attendance requires travel of several miles for these students. On the other hand, Patrick Henry is well to the west of the center of the city and at a very much shorter distance from these applicants. Ramsay School, just completed in September 1958, is even closer. In the circumstances Criteria 1 cannot be interposed by the Board to bar these children from Patrick Henry or Ramsay.

II. *A, B, C, D, E, F, I, J and K Cannot Be Barred For Overcrowding*

Nine children were refused admissions to Ramsay and Patrick Henry elementary schools and to Hammond High School on the basis of overcrowding. Seven of these would be pupils in Ramsay or Patrick Henry and two in Hammond. In these school buildings the ratio of enrollment to capacity is not so great as to justify any exclusion for the proposed slight increase. The adverse ruling of the Board cannot stand.

III. *D and F Can, But E, G, H, I, J and K Cannot, Be Excluded For Academic Deficiency*

Eight of the minor plaintiffs failed of admission on the test of academic achievement or mental capacity. With the exception of D and F, that determination must be overturned.

D is in the fifth grade at Lyles-Crouch School and sought entrance to Patrick Henry or Ramsay. His grade placement is scored at 3.1 (3 grade, 1 month) on the California Achievement Test. The median at Patrick Henry is 4.9. The lowest grade placement at Patrick Henry is 3.3. The median at Ramsay is 5.4 and the lowest placement is 3.0. On the other hand, the median at Lyles-Crouch is 3.3 with the lowest at 1.1. This recital shows that the Board was not without reason in refusing to remove Otis from Lyles-Crouch to either Patrick Henry or Ramsay.

The same is true of second-grader F, with an I.Q. of 81 and a mental age of 5 years, 9 months,

against a chronological age of 7 years, 4 months. She is below both the median I.Q. and mental age in Lyles-Crouch, her present school, and well below Patrick Henry's median I.Q. of 103 and mental age of 7 years, 8 months, as well as Ramsay's median I.Q. of 111 and mental age of 8 years, 5 months.

Summary

Kathryn C. Turner, Sandra Turner, Gerald Turner, Jessie Mae Jones and Sarah A. Ragland should be admitted either to Patrick Henry or Ramsay school, as the Board may select; James E. Lomax and Margaret I. Lomax should be admitted to the Theodore Ficklin School; and Patsy Ragland and James Ragland should be ad-
February 6th, 1959.

Effective Date

The court has studied the suggestion of the defendants' counsel that, if any of the 14 applications were granted by the court, the admissions be deferred until the commencement in September of the 1959-60 session. This delay cannot be allowed, for the reason that, aside from a consideration of the rights of the plaintiffs, a postponement from one session to another, as distinguished from one semester to another in the same session, would involve many problems. Among others, it would mean a wholly new review, administrative and possibly judicial, of the qualifications of all the applicants here, because of their completion of one grade and entrance into another in the interval.

The admissions now found to be required should be effectuated at the opening of the several schools on the morning of Tuesday, February 10, 1959.

February 4, 1959.

* * *

KEY TO CASES AND RESIDENCE

Case A. Kathryn C. Turner, 211 Lincolnia Road
Case B. Sandra Turner, 211 Lincolnia Road
Case C. Gerald Turner, 211 Lincolnia Road
Case D. Otis E. Jones, 6346 Stevenson Avenue
Case E. Jessie Mae Jones, 6346 Stevenson Avenue
Case F. Betty Jo Jones, 6346 Stevenson Avenue
Case G. James E. Lomax, 1120 North Fairfax Street
Case H. Margaret I. Lomax, 1120 North Fairfax Street
Case I. Patsy Ragland, 6346 B Stevenson Avenue
Case J. James Ragland, 6346 B Stevenson Avenue
Case K. Sarah A. Ragland, 6346 B Stevenson Avenue
Case L. Timothy C. Taylor, 415 Wilkes Street
Case M. Theodosia Hundley, 409 South Saint Asaph Street
Case N. Pearl Hundley, 409 South Saint Asaph Street

CASES APPLYING FOR CERTAIN GRADES IN CERTAIN SCHOOLS

Case A. Applying for sixth grade in Patrick Henry from sixth grade in Lyles-Crouch
Case B. Applying for second grade in Patrick Henry from second grade in Lyles-Crouch
Case C. Applying for first grade in Patrick Henry from first grade in Lyles-Crouch
Case D. Applying for fourth grade in Patrick Henry from fourth grade in Lyles-Crouch
Case E. Applying for third grade in Patrick Henry from third grade in Lyles-Crouch
Case F. Applying for second grade in Patrick Henry from second grade in Lyles-Crouch
Case G. Applying for second grade in Theodore Ficklin from second grade in Houston
Case H. Applying for first grade in Theodore Ficklin from first grade in Houston
Case I. Applying for tenth grade in Hammond High from tenth grade in Parker-Gray
Case J. Applying for ninth grade in Hammond High from ninth grade in Parker-Gray
Case K. Applying for third grade in Patrick Henry from third grade in Lyles-Crouch
Case L. Applying for ninth grade in George Washington from ninth grade in Parker-Gray
Case M. Applying for tenth grade in George Washington from tenth grade in Parker-Gray
Case N. Applying for ninth grade in George Washington from ninth grade in Parker-Gray

Hearing on Motion to Modify, February 6, 1959

The Court: Gentlemen, this matter before me is a motion to modify the order already entered. It presents matters that have already been submitted to the Court. The Court has given its best judgment on it, after as careful a study as it is or was capable of. It sees no reason to alter the conclusions that it has already stated and declared in its findings and in its decree.

There is no undue expedition of the case. I can assure you that an expedition of the case is always a strain upon the Court, and it is not something that any Court desires except in the public interest. These applications were filed in August. The suit, as I recall it, to follow up the applications for admissions, was filed in September. The Court, by agreement of counsel, set the case for hearing on October the 30th, for a full hearing. At the request of both sides, the Court took the case off of the calendar for October 30th on the representation that it could be better submitted on a motion for summary judgment. Thereafter an agreed order was submitted and the order was signed continuing the case to such time as it could be heard in the regular course of matters, or on notice by the Court, it may have been stated. In any event, the matter came on again upon the regular scheduled standing pre-trial date and was called then for a pre-trial hearing and the trial assignment date.

The circumstances of the case required that it be heard immediately, and it was fixed at that time for another date and heard. Thereupon, an injunction was entered and the defendants were within a fixed time to submit to the plaintiffs their administrative action on the applications of the plaintiffs' for admission. This was done. Thereafter the case was brought up before the Court for a hearing on the administrative action. That required immediate action by the Court and after the Court heard evidence for one or two days, it gave its decision. It was necessary that there be an expeditious decision and such a decision threw upon the Court additional pressure of work, plus the pressure of time. The Court endeavored to meet that by intensive and extensive application than is ordinarily required. It has given its best judgment to the problem for which you now ask a modification and there are no circumstances brought forth to indicate any grounds for a change in that decision.

For that reason the motion must be denied.

February 6th, 1959

EDUCATION
Public Schools—Virginia (Arlington)

E. Leslie HAMM, Jr., an infant, by E. Leslie Hamm, Sr., his father and next friend, et al. v. COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA, and Ray E. Reid, Division Superintendent of Schools, Arlington County, Virginia.
COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA, and Ray E. Reid, Division Superintendent of Schools, Arlington County, Virginia, v. Ronald DESKINS, Michael Gerard Jones, Lance Dwight Newman, and Gloria Delores Thompson.

United States Court of Appeals, Fourth Circuit, January 23, 1959, No. 7776, 263 F.2d 226.

SUMMARY: In a class action in federal district court, Negro school children in Arlington County, Virginia, obtained an injunction against school officials, requiring their admission to schools without discrimination on the basis of race. *Thompson v. County School Board of Arlington County*, 144 F.Supp. 239, 1 Race Rel. L. Rep. 890 (E.D. Va. 1956). The Court of Appeals for the Fourth Circuit affirmed, holding in part that the Virginia Pupil Placement Act (1 Race Rel. L. Rep. 58, 1109) was inapplicable in the case. 240 F.2d 59, 2 Race Rel. L. Rep. 59 (1956); *cert. denied*, 353 U.S. 910, 2 Race Rel. L. Rep. 300 (1957). Subsequently, the district court amended the decree so as to require admission of all school

children on a racially non-discriminatory basis beginning in September 1957, but denied a motion to suspend the operation of the injunction pending a ruling by the Supreme Court on another case involving the constitutionality of the Pupil Placement Act. 2 Race Rel. L. Rep. 810 (1957).

Thereafter, seven Negro pupils were denied admission to previously "white" schools because they had failed to apply to the state Pupil Placement Board for transfer. The Negroes then moved for further relief and for enforcement of the court's order. The court directed admission to the schools applied for by September 23, 1957, stating that the admission of the pupils to public schools could not be denied on the basis of a failure to comply with the Pupil Placement Act. The injunction was, however, suspended pending appeal. 159 F.Supp. 567, 2 Race Rel. L. Rep. 987 (E.D. Va. 1957). The Court of Appeals for the Fourth Circuit affirmed, stating that the order was "clearly proper," 252 F.2d 929, 3 Race Rel. L. Rep. 187. This decision came too late, however, to affect the 1957-58 school term. In the summer of 1958, 30 Negro students sought transfer to "white" schools. The state Pupil Placement Board denied all the transfers, citing various provisions of the placement act. The federal district court reviewed this action and found that in 26 of the cases, it could not be said the transfers were refused without substantial supporting evidence. However, in four other cases, there was no evidence found to support a refusal to transfer, and admission was ordered. Because the school term had already started, the court delayed the effective date of the order until mid-term. 166 F.Supp. 529, 3 Race Rel. L. Rep. 931 (E.D. Va. 1958). The Court of Appeals for the Fourth Circuit affirmed the judgment as to the four ordered admitted, directing the mandate of the court to issue forthwith, but it deferred further consideration of conclusions concerning the 26 remaining applications. A motion by the school officials for recall and stay of mandate to enable them to petition the Supreme Court for certiorari was denied by the chief judge because of the protracted history of the litigation, the previous postponement by the district court, the affirmance on the merits in the instant proceedings, a contemporary denial by the district court of a motion to stay, and a failure to show administrative or other difficulties requiring a stay. Finally, Chief Justice Warren of the Supreme Court denied a similar motion, stating that the required "test of extraordinary showing" had not been met. The Fourth Circuit's opinion, the motion to the chief judge for recall and stay of mandate, the memorandum of the chief judge denying the motion, and Chief Justice Warren's announcement of denial follow.

PER CURIAM:

Two previous decisions in this case are reported sub nom. in Thompson v. School Board of Arlington County, 144 F.Supp. 239, affirmed, 240 F.2d 59, cert. den. 353 U.S. 910, and 159 F. Supp. 567, affirmed, 252 F.2d 929, cert. den. 356 U.S. 568. In the first of these cases the County School Board of Arlington County and the Division Superintendent of Schools thereof were restrained from refusing to admit to the schools of the County on account of race any child otherwise qualified, and in the second case the same authorities were restrained from refusing to admit seven Negro children who had applied for admission. The present appeal is taken from a supplementary order of injunction entered by the District Court on September 22, 1958, in which the court sustained the rejection by the school authorities of the applications for transfer to white schools filed by twenty-six Negro children and approved the applications for transfer to a white school of four other Negro children to take effect from the commencement of the second semester of the school session of 1958-59, retaining jurisdiction to grant further relief as required.

[*Appeal Taken*]

An appeal has been taken to this court on behalf of the plaintiffs whose applications were rejected and a cross-appeal by the school authorities from that part of the injunction which directed the transfer of the four Negro pupils. All the applications for admission involved transfers from Negro to white schools, and all of the decisions were made by the school officials in the exercise of their administrative authority. The decisions were made as a result of the screening of the pupils against the criteria of five categories designated as Attendance Area,

Overcrowding at Washington and Lee High School, Academic Accomplishment, Psychological Problems and Adaptability. For a more particular description of these tests and the application thereof to the students involved in this case reference may be made to the decision of the District Court in 166 F.Supp. 529. Twenty-five of the applications for transfer were refused because of the failure of the students to meet successfully two or more of the first four tests while five of the applications were rejected by reason of the failure of the applicants to meet the test of adaptability. The rejection of one of the five was approved by the District Judge. We confine our discussion in this opinion to the remaining four in this group since we are in accord with the conclusion of the District Judge that they should be admitted at the beginning of the second semester which is now imminent. We defer for further consideration the twenty-six remaining applications which require further examination of the relevant circumstances before final conclusions can be reached.

[*Test of Adaptability*]

The four applicants, whose admission was directed by the District Court, successfully passed the first four tests, but were nevertheless rejected on the ground that they failed to pass the test of Adaptability. The explanation of the County School Board for this decision is set out in the following excerpt from the opinion of the District Judge:

> "On this last criterion the principal witness was the Superintendent of Schools. With thirty-two years in segregated schools, his experience covers both Negroes and Caucasians, though separately. He defines Adaptability as including the ability to accept or conform to new and different educational environment. In reference to these five pupils he readily concedes that their places of residence would entitle them to go to the schools of their application—Pupil A to Patrick Henry Elementary School, and 7, 13, 16 and 20 to Stratford Junior High School.
>
> "But the point made by the Superintendent is that these students would, respectively, be injured by placement in Patrick Henry or in Stratford Junior High School. His reason is that they would lose their present position of school superiority and leadership. At Hoffman-Boston 7, 13, 16 and 20 rate about two years above the school norm of achievement. They are nearly a year ahead of the national norm. However, if they enter Stratford, they will not, as they are in Hoffman-Boston, be in the top group, but just above the achievement median of that school. They will not be among the leaders. Analogous reasoning is applied to A at Patrick Henry. The Superintendent feels that this would be discouraging and possibly emotionally disturbing to them. Race or color is not the basis for his opinion, though, he owns, the necessity for his decision is occasioned by the removal of racial bars."

[*Affirmed As to Four*]

The District Judge could find no ground in the record to uphold the Board's refusal of the transfer in these four cases. He pointed out that the homes of the students were near the school to which they applied for transfer and within the Attendance Area designated by the County School Board as appropriate to this school. He also pointed out that each of the students stood above the achievement median of the white students at this school, that they had a common age of twelve years and had formerly attended an elementary school together and were presumably friends having common interests, and all would enter the first year of the junior high school. Bearing all of these circumstances in mind, he concluded that no legal ground for the rejection of the four applications existed. We are in accord with this finding, for it is clear that the transfers were denied on the basis of race.

Under these circumstances we have no occasion at this time to pass on the propriety and application of the five tests laid down by the County School Board with respect to the remaining twenty-six requests for transfer. Accordingly we express no opinion with respect thereto.

The judgment of the District Court as to Ronald Deskins (7), Michael Gerard Jones (13), Lance Dwight Newman (16) and Gloria Delores Thompson (20) is affirmed. Let the mandate of the court issue forthwith.

FOURTH CIRCUIT COURT OF APPEALS DENIES STAY

Counsel for the respective parties appeared before me today and were heard upon the School Board's motion for recall and stay of the mandate pending petition for certiorari.

Bearing in mind the protracted history of this litigation; the fact that the effective date of the District Court's order admitting four of the plaintiffs was postponed by that Court last September to February 2, 1959; that since then the merits have been examined and passed upon by this Court, which affirmed Judge Bryan's order; that the District Court has as late as yesterday considered the present situation and denied a motion for further stay; no administrative or other difficulties requiring a stay appearing; the motion is hereby denied.

s/Simon Sobeloff
Chief Judge, Fourth Circuit

CHIEF JUSTICE WARREN DENIES STAY

"Upon consideration of the memorandum in support of the application and of the opposition thereto, I conclude that the test of extraordinary showing required in these circumstances by Magnum Import Company versus Coty, 262 U.S. 159, 164, has not been met.

"The Motion for recall and stay of mandate of the U.S. Court of Appeals for the Fourth Circuit is denied."

EDUCATION
Public Schools—Virginia (Charlottesville)

The SCHOOL BOARD OF THE CITY OF CHARLOTTESVILLE, VIRGINIA, et al. v. Doris Marie ALLEN, et al.
Doris Marie ALLEN, et al. v. The SCHOOL BOARD OF THE CITY OF CHARLOTTESVILLE, VIRGINIA, et al.

United States Court of Appeals, Fourth Circuit, January 29, 1959, 263 F.2d 295.

SUMMARY: Negro children in Charlottesville, Virginia, filed class actions in a federal district court, seeking admission to white schools. An injunction forbidding discrimination against plaintiffs was issued, and was affirmed by the Court of Appeals for the Fourth Circuit. 240 F.2d 59, 1 Race Rel. L. Rep. 886, 2 Race Rel. L. Rep. 59; *cert. denied*, 353 U.S. 910, 2 Race Rel. L. Rep. 300. On September 13, 1958, following a hearing, the district court ordered the immediate admission of 12 named plaintiffs, and the Court of Appeals refused to stay the effective date of the order. On September 19, the governor of Virginia closed the schools. On October 9, the district court enjoined the use of public funds to pay teachers in private schools in Charlottesville. ——F.Supp.——, 3 Race Rel. L. Rep. 937 (W.D. Va. 1958). On January 29, 1959, the Chief Judge of the Court of Appeals for the Fourth Circuit stayed the September 13 decree, under the condition that defendant school officials submit their plan for complying with it to the district court within 20 days Whereas defendants formerly could give no assurance that a stay would facilitate compliance, the chief judge was now satisfied from a recent school board resolution, city council minutes, and representations by defendants' counsel that they in good faith intended to comply "expeditiously and completely" with the district court decree, since statutory bars to local school board autonomy had meanwhile been removed by judicial decision. [See *Harrison v. Day*, ——S.E.2d——, 4 Race Rel. L. Rep. 65 (Va. 1959) *infra*]. The chief judge noted approv-

ingly the board's preliminary plan for special tutoring of the twelve plaintiffs with a view to their admission to the white schools as soon as practicable, and in no event later than September, 1959. The memorandum opinion and order follow:

SOBELOFF, Chief Judge.

MEMORANDUM

Last September, when the School Board of Charlottesville, Virginia, applied to me for a stay of the order of the District Court admitting the twelve Negro plaintiffs to two of the formerly white public schools, the Board was unable to give assurances that a stay, if granted, would facilitate compliance with the decree appealed from. The reason asserted, and obvious to all, was that under certain laws then on the Virginia statute books, the School Board was denied autonomy in the management of its school system, and any school faced with any degree of desegregation was required to be closed by order of the Governor. In the circumstances I found no basis for granting a stay.

[*Subsequent Litigation*]

Since then, as is well known, there has been further litigation in the Supreme Court of the United States, in this and other federal courts and in the Supreme Court of Appeals of Virginia. Whatever doubt there may have existed formerly, it is now frankly and correctly recognized by the Board that such statutes constitute no bar to the operation of racially non-segregated schools; and the Board is now no longer impeded from taking steps which, but for such statutes, it was willing to take to comply with the District Court's decree.

Mr. John S. Battle, Jr., Counsel for the Board, whose appeal is now pending, and Messrs. Oliver W. Hill and Spottswood W. Robinson, III, Counsel for the twelve Negro children, conferred with me at length today. Mr. Battle brought to my attention a resolution passed unanimously on January 26, 1959, by the School Board; also an extract from the minutes of the meeting on January 27, 1959, of the Council of the City of Charlottesville, in which that body by unanimous vote expresses its purpose to cooperate with and support the School Board in complying expeditiously and completely with the decree of the District Court.

The plan outlined by the School Board will undertake a complete revision of past policies and practices respecting the assignment of children to the public schools and the necessary formulation of new elementary school districts to equalize the pupil population among the various schools. The School Board's present attitude deserves commendation. It is apparent that the Board should be afforded a reasonable time to accomplish the administrative adjustments essential to a positive and effective transition from a racially segregated to a non-segregated public school system in Charlottesville, and that it should be assisted in its determination to move within the frame and spirit of the Court's decree.

[*Proposed Action*]

More than 1700 children were displaced when the Governor closed the Venable and Lane schools in September. Since then, many of the affected children have received some measure of academic instruction by private arrangement. As commendable as these community efforts have been, the School Board correctly recognizes that this cannot continue as a permanent program. Moreover, there is a need for remedial instruction of some of the displaced children, widely varying between those white children who attended classes under the auspices of organized local private groups and others, including the twelve Negro appellees, whose opportunities were far more limited. The Board has proposed to provide immediately regular teachers and adequate facilities for the special tutoring of the twelve children with a view to their admission to regular classes at Venable and Lane as soon as practicable, and in no event later than next September.

With full confidence in Mr. Battle, and convinced that the representations made by him have the support of his clients, I think that they should have the opportunity to present their plan to Judge John Paul in the District Court, who passed the original order and who has the primary responsibility in the matter. I think, further, that the plan is entitled to consideration without holding over the heads of the school and local governmental authorities the coercive threat of continued school closure. The schools were not closed by any federal court action, and

where complete confidence exists that the brief time necessary will be employed to further, not impede or evade, the Court's decrees, there is no need to continue the unhappy conditions which have prevailed in Charlottesville since the normal school opening date last fall.

[*Decree Stayed*]

The plan may be presented to Judge Paul within twenty days, and considered by him as early as he finds his schedule permits. The twelve plaintiffs are assured full admission not later than next fall, and are to be offered such assistance by way of adequate tutoring and use of school laboratories and other facilities as may be necessary or desirable to effect their early and orderly transition under the new plan.

It remains to say that while Messrs. Hill and Robinson properly have stressed their clients' present rights, won after struggle in proceedings begun before the Board as early as the spring of 1956, I am satisfied from the attitude of reason and fairness these lawyers have displayed in the conferences before me that they can and will aid in effecting orderly procedures beneficial to their clients and others of their race, and contributing also to the good order and harmony of the entire population of Charlottesville.

ORDER

The appellants have indicated their purpose to effect expeditious and complete compliance with the decree of the District Court, and their desire to propose a plan to this end. Being satisfied of the defendants' good faith, the said decree is hereby stayed; provided the defendants submit their plan to the District Court within 20 days.

The appeal is hereby dismissed with the consent of the appellants.

As to the cross-appeal, the same is hereby dismissed without prejudice, Counsel for cross-appellants and cross-appellees consenting to this action.

The case is remanded to the District Court for further consideration and the passage of such orders as may be deemed appropriate.

EDUCATION
Public Schools—Virginia (Norfolk)

In a suit filed by Negroes in Norfolk, Virginia, for admission to "white" schools, the federal district court, in January, 1957, held the Virginia Pupil Placement Act (Ch. 70, Va. Acts of 1956, 1 Race Rel. L. Rep. 1109) unconstitutional, and ordered the defendants to cease refusing, solely on account of race, to admit plaintiffs to schools classified as white. —— F.Supp. ——, 2 Race Rel. L. Rep. 46, 337 (E.D. Va. 1957). The Court of Appeals for the Fourth Circuit affirmed, 246 F.2d 325 (4th Cir. 1957), *cert. denied*, 355 U.S. 855 (1957). Although the effective date of the district court order was September, 1957, no further action was taken until June, 1958, when District Judge Hoffman ordered the school board to act on the Negroes' applications for transfer with "reasonable promptness." The school board then made a series of tests of prospective transferees, but denied all of the applications. On August 25, Judge Hoffman met with the school board and outlined what the court would consider acceptable criteria for assignment. The school board then announced that 17 Negroes would be assigned to white schools. See 3 Race Rel. L. Rep. 942-964 (1958). The board's assignments were accepted by the court on September 18. *Beckett v. School Board of Norfolk, Virginia*, —— F.Supp. ——, 3 Race Rel. L. Rep. 1155 (E.D. Va. 1958). Subsequently a number of legal developments occurred, which are set out chronologically below.

City Council Ordinance of November 25, 1958

On November 25, the Norfolk City Council adopted an ordinance making appropriations for 1959, specifying that the appropriation for city public schools was made tentatively, that no part of the appropriated funds should be available to the school board except as the council

by resolution from time to time authorized, and that it reserved the right to change or cancel the unexpended portion and to prohibit the expenditure of the unexpended portion at any time during the year.

ORDINANCE NO. 19,679

AN ORDINANCE making appropriations for the Fiscal Year beginning January 1, 1959 and ending December 31, 1959, in the sum of Thirty-Six Million, Eight Hundred Eighty-Seven Thousand, Four Hundred Forty Dollars and Five Cents ($36,887,440.05), and regulating the payment of money out of the City Treasury.

WHEREAS, the City Manager has heretofore submitted to the Council an Annual Budget for the City for the fiscal year beginning January 1, 1959 and ending December 31, 1959, which has been amended by the Council, and it is necessary to appropriate sufficient funds to cover said Budget, as amended; now, therefore,

BE IT ORDAINED by the Council of the City of Norfolk:

Section 1:—That the amounts herein named, aggregating Thirty-Six Million, Eight Hundred Eighty-Seven Thousand, Four Hundred Forty Dollars and Five Cents ($36,887,440.05), or so much thereof as may be necessary, as set forth in the Annual Budget for the fiscal year 1959, submitted by the City Manager under date of October 21, 1958, as amended by the Council, a copy of which Annual Budget, as amended, is attached hereto and made a part hereof, are hereby appropriated, subject to the conditions hereinafter set forth in this ordinance, from the revenues of the City from all sources for the year 1959, for use of the several departments of the City Government, and for the purposes hereinafter mentioned, as set forth in said Annual Budget, as amended, for the fiscal year beginning January 1, 1959 and ending December 31, 1959, as follows:

General Government	$2,437,200.83
Department of Law	94,327.00
Department of Public Works	4,864,159.00
Department of Public Welfare	4,711,720.00
Department of Public Safety	4,850,012.00
Department of Finance	634,959.00
Library and Museum	306,561.00
Interest and Sinking Fund	4,729,782.22
Department of Parks and Recreation	1,153,872.00
Department of Public Health	971,509.00
Norfolk Port Authority and Airport	60,000.00
Public Schools	11,323,338.00
Permanent Public Improvements	750,000.00
Total	$36,887,440.05.

Section 2:—That the pay ranges of the various officers and employees of the City as set forth in the 1958 Revised Compensation plan for the Officers and Employees of the City, as the same may have been heretofore changed, are hereby changed, as may be necessary, to conform to the pay ranges of said officers and employees as set forth in said Annual Budget, as amended by the Council.

Section 3:—That the salaries and wages set forth in detail in said Annual Budget, as amended by the Council, are hereby authorized for those officers and employees qualified for said salaries and wages under the provisions of the 1958 Revised Compensation plan for the Officers and Employees of the City, as changed, and that changes in personnel occurring during said fiscal year shall be administered by the City Manager in accordance with the Regulations for the Administration of said Compensation Plan. Where such administrative changes require the allocation of additional funds, the City Manager is authorized to make such allocations from the Contingent Fund.

The positions, except in the labor class and in cases where the number thereof is not under the control of the Council, set forth as line items in said Annual Budget, as amended by the Council, shall be the maximum number of positions authorized for the various departments, bureaus and divisions of the City during said fiscal year, and the number thereof shall not be increased during said fiscal year unless authorized by the Council. The City Manager may, from time to time, increase or decrease the number of positions in the labor class provided the aggregate amount expended for such service shall not exceed the respective appropriations made therefor.

The salaries and wages set out in detail in said Annual Budget, as amended by the Council, for officers and employees who are not embraced within the aforesaid Compensation Plan of the City, are hereby authorized and fixed as the maximum compensation to be paid such officers and employees for services rendered.

The Council reserves the right to change at any time during said fiscal year the compensation so provided for any officer or employee and to

abolish any office or position provided for in said Annual Budget, as amended by the Council, except such officers or positions as it may be prohibited by law from abolishing. The City Manager is authorized to make such rearrangements of positions in the several departments named therein as may best meet the uses and interest of the City.

Section 4:—That the pension supplements for certain retired school teachers, as provided by Ordinance No. 16,254, adopted November 25, 1952, and Ordinance No. 17,582, adopted February 23, 1955, are hereby continued for the fiscal year 1959.

Section 5:—That, by reason of the present legal situation with regard to the operation of the public schools of the City, the appropriation herein made for said public schools is made on a tentative basis, and no part of the funds so appropriated shall, in any event, be available to The School Board of the City of Norfolk except as the Council may, from time to time, by resolution authorize the payment or transfer of such funds, or any part thereof, to said School Board.

Section 6: —That the appropriation herein made for the public schools of the City is made on a tentative basis; that the Council reserves the right to change or cancel the unexpended portion of said appropriation for public schools at any time during said fiscal year; and that the Council reserves the right to prohibit the expenditure of the unexpended portion, or any part thereof, of said appropriation for public schools.

Section 7:—That all other amounts and allowances set out in detail in said Annual Budget, as amended, are fixed, as therein set forth, subject to the right of the Council to change or cancel the unexpended portion of the same at any time during the said fiscal year.

Section 8:—That all payments from the appropriations provided for in this ordinance and from balances remaining on December 31, 1958, to the credit of appropriations for works, improvements or other objects which have not been completed or abandoned, other than appropriations made for the 1958 Budget, shall be made at such time as the City Manager may direct, unless otherwise specified by Council.

Section 9:—That the various amounts appropriated by this ordinance for the several groups, as set forth in said Annual Budget, as amended, are to be expended for the purposes designated by said groups, provided, however, that the City Manager may, with the consent of the Council, authorize the transfer of funds from one group to another within the same department.

Section 10:—That if any part or parts, section or subsection, sentence, clause or phrase of this ordinance is for any reason declared to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this ordinance.

Section 11:—That this ordinance shall be in effect from and after thirty days from the date of its adoption.

Adopted by the Council November 25, 1958.
Effective December 25, 1958.

City Council Resolution of December 30, 1958

On December 30, 1958, the Norfolk City Council authorized the transfer to the School Board during January, 1959, of $1,098,000 from public school funds previously tentatively appropriated, on condition that the Board not disburse any of it for the normal daytime operation of schools under the Governor's control without his prior approval, and reserving to itself the right to change or cancel the transfer and to prohibit the expenditure of the unexpended portion.

A RESOLUTION authorizing and directing the transfer to the School Board of the City of Norfolk during the month of January, 1959, from the funds tentatively appropriated by the Council for the public schools of the City of Norfolk for the fiscal year beginning January 1, 1959 and ending December 31, 1959, of the sum of $1,098,000, on certain conditions.

WHEREAS, the appropriation made by the Council for the public schools of the City of Norfolk for the fiscal year beginning January 1, 1959 and ending December 31, 1959 was made on a tentative basis, and no part of the funds so appropriated will be available to The School Board of the City of Norfolk except as the Council may, from time to time, by resolution, authorize the payment or transfer of such funds, or any part thereof, to said School Board; and

WHEREAS, it is the judgment of the Council that $1,098,000 of such funds so appropriated be transferred to said School Board during the month of January, 1959, on certain conditions hereinafter set forth; and

WHEREAS, it is necessary for the usual daily operation of the Department of Finance that provision be immediately made to transfer said sum of $1,098,000 to said School Board during the month of January, 1959, on said conditions, an emergency is set forth and declared to exist, pursuant to Section 15 of the Norfolk Charter of 1918; now, therefore,

BE IT RESOLVED by the Council of the City of Norfolk:

Section 1:—That the City Treasurer is hereby authorized and directed to transfer to The School Board of the City of Norfolk during the month of January, 1959, from the funds tentatively appropriated by the Council for the public schools of the City of Norfolk for the fiscal year beginning January 1, 1959 and ending December 31, 1959, the sum of $1,098,000, said sum to be disbursed on orders from said School Board, provided, however, that no part of said sum shall be disbursed for the normal daytime operation of the schools now under the control of the Governor of Virginia without his prior approval.

Section 2:—That the Council reserves the right to prohibit the expenditure of the unexpended portion, or any part thereof, of said sum of $1,098,000.

Section 3:—That the Council reserves the right to change or cancel the transfer of so much of said sum of $1,098,000 as has not been transferred, at the time of such change or cancellation, by the City Treasurer to said School Board.

Section 4:—That this resolution, being an emergency resolution, shall be in effect from and after its adoption.

Adopted by the Council December 30, 1958.

City Council Resolution of January 13, 1959

On January 13, 1959, the Norfolk City Council resolved not to authorize the payment or transfer to the School Board, for use during February, 1959, or afterwards, for the operation of any grade higher than the sixth, of any of the tentatively appropriated school funds, but it assumed the payment of employees' wages and salaries coming due after February 2 under contracts with the board.

A RESOLUTION expressing the sense of the Council with respect to the maintenance and operation of the public schools of the City of Norfolk.

WHEREAS, the annual appropriation ordinance of the City of Norfolk for the fiscal year 1959, adopted November 25, 1958, appropriated funds for the public schools of the City of Norfolk on a tentative basis and provided that no part of the funds therein appropriated for said public schools would be available to The School Board of the City of Norfolk except as the Council might, from time to time, by resolution, authorize the payment or transfer of such funds, or any part thereof, to said School Board; and

WHEREAS, said annual appropriation ordinance provided further that the Council reserved the right to change or cancel, at any time during said fiscal year, the unexpended portion of the appropriation made therein for public schools and that the Council reserved the right to prohibit the expenditure of the unexpended portion, or any part thereof, of the appropriation made therein for public schools; and

WHEREAS, it is necessary for the immediate preservation of the public peace, property, health and safety and for the usual daily operation of the Department of Finance that the sense of the Council with respect to the maintenance and operation of the public schools of the City of Norfolk be immediately stated, an emergency is set forth, defined and declared to exist, pursuant to Section 15 of the Norfolk Charter of 1918; now, therefore,

BE IT RESOLVED by the Council of the City of Norfolk:

Section 1:—That the public welfare of the City of Norfolk requires the maintenance and operation of grades 1 through 6, both inclusive, as the public schools of said City.

Section 2:—That the Council does not propose, at this time, to authorize the payment or transfer to The School Board of the City of Norfolk, for use by it during the month of February, 1959 or during any month subsequent thereto for the maintenance and operation of any grade higher than the sixth grade, of any part of the funds tentatively appropriated for the public schools the City of Norfolk by the annual appropriation ordinance of the City of Norfolk for the fiscal year 1959, adopted November 25, 1958; and that said School Board is hereby requested to make such arrangements as may be necessary to maintain and operate, beginning February 2, 1959, only grades 1 through 6, both inclusive.

Section 3:—That the City of Norfolk will assume payment of the salaries and wages of the employees of said School Board which become due and payable after February 2, 1959, under contracts between said School Board and its employees in effect on February 2, 1959, and which are not otherwise paid or provided for.

Section 4:—That the City Clerk is hereby directed to transmit a certified copy of this resolution to each member of said School Board and to the Division Superintendent of Schools of the City of Norfolk.

Section 5:—That this resolution, being an emergency resolution, shall be in effect from and after its adoption.

Adopted by the Council January 13, 1959.

Action to Enjoin Enforcement of "Massive Resistance" Laws

On October 27, 1958, certain white children and their parents filed suit in federal district court in Norfolk against the Governor and Attorney General of Virginia and Norfolk school officials, seeking an injunction against enforcement of state "massive resistance" laws [see 1 Race Rel. L. Rep. 1091-1111 (1956); 3 Race Rel. L. Rep. 340-343, 767 (1958)]. A three-judge court on January 19 decided to enjoin permanently the enforcement of the statutes as applied to Norfolk public schools. It was held that so long as the state or a city maintains or participates in the management of a school system, the closing of a public school or grade to avoid desegregation while permitting others that remain segregated to operate at taxpayers' expense, violates the equal protection and due process clauses of the Fourteenth Amendment. The contention that because the schools are equally closed to white and Negro children there is no unconstitutional discrimination, was rejected, the court stating that equal protection was denied when plaintiffs, members of a class eligible for public education, were not accorded it on a basis equal to others. The contention was also rejected that this was a suit against a state in violation of the Eleventh Amendment, on the ground that the suit was not against a state since full relief could be granted without requiring the state to take affirmative action. The court noted that it was not directing the reopening of schools, but rather was declaring the governor's school-closing proclamation [3 Race Rel. L. Rep. 963 (1958)] void because predicated on an unconstitutional statute, and in effect was restoring to the Norfolk School Board the rights and duties it formerly had, including the

duty to comply with the court order of February 26, 1957, in the *Beckett* case. [See background summary, supra, p. 41]. The court's opinion and the injunctive decree of January 23, 1959, appear below.

Ruth Pendleton JAMES, et al. v. J. Lindsay ALMOND, Jr., Governor of Virginia, et al. United States District Court, Eastern District, Virginia, Norfolk Division, January 19, 1959, Civil Action No. 2843.

Before SOBELOFF, Circuit Judge, HAYNSWORTH, Circuit Judge, and HOFFMAN, District Judge.

PER CURIAM.

In this action for a preliminary and permanent injunction certain children of the white race, together with their parents, seek to restrain the enforcement, operation and execution of Sections 22-188.3, 22-188.4, 22-188.5, 22-188.6, 22-188.7, 22-188.8, 22-188.9, 22-188.10, 22-188.11, 22-188.12, 22-188.13, 22-188.14, and 22-188.15 of the Code of Virginia, 1950, as amended by the Acts of Assembly, Extra Session, 1956, and the Acts of Assembly, 1958. The statutes in question have been referred to by counsel as the "massive resistance" laws. As stated by defendants in their brief, the statutes are all a part of an overall effort or plan of the General Assembly to deal with the problems created by the decision of the United States Supreme Court in Brown v. Board of Education, 347 U.S. 483, and its impact upon the social, economic, and political conditions existing in Virginia as related to the children of this state.

The defendants are the Chief Executive and the Attorney General of the Commonwealth of Virginia, as well as the individual members of the School Board of the City of Norfolk, the Division Superintendent of Schools, and the School Board of the City of Norfolk, Virginia, a body corporate.

As injunctive relief is sought against certain officers of the state, a three-judge district court was convened pursuant to 28 U.S.C. §§ 2281, 2284.

[*Litigation Background*]

The background of this litigation may be obtained by a casual reference to certain documents introduced in evidence and a study of the proceedings in the case of Beckett v. The School Board of the City of Norfolk, Civil Action No. 2214, which has been pending in this court since May, 1956, and in which numerous orders have been entered and appeals taken.[1] Subsequent to the decision of the United States Supreme Court in Brown v. Board of Education, supra, the Report of the Commission on Public Education was submitted to the Governor of Virginia on November 11, 1955. This Report, as well as Senate Joint Resolution No. 3 known as the "Interposition Resolution" and the Governor's address to the General Assembly of Virginia at its Extra Session of 1956, have been fully discussed in Beckett v. The School Board of the City of Norfolk, 148 F.Supp. 430, and need not be repeated. It is sufficient to state that the Report of the Commission on Public Education, referred to as the "Gray Report", was not adopted by the General Assembly. Thereafter, in the Inaugural Address of the present Governor of Virginia delivered on January 11, 1958, it was stated that no integration would be permitted in Virginia. While these documents are of no great moment in the final determination of the issues now before the court, they were admitted in evidence as a part of the legislative history for the purpose of ascertaining the legislative purpose and intent. NAACP v. Patty,

1. The officially reported opinions Beckett v. The School Board of the City of Norfolk are as follows:
   (a) 148 F.Supp. 430—an opinion by District Judge Hoffman holding the Pupil Placement Act (Chapter 70, Acts of Assembly, Extra Session, 1956) unconstitutional on its face.
   (b) 246 F.2d 325—An opinion by the United States Court of Appeals for the Fourth Circuit affirming the action of the district judge in ruling the Pupil Placement Act unconstitutional, and in enjoining the defendants from discriminating, solely on account of race or color, in admitting, assigning, or enrolling children to the public schools of the City of Norfolk.
   (c) 355 U.S. 855—The United States Supreme Court denied a writ of certiorari in the aforesaid case.
   (d) — F.2d — —The United States Court of Appeals for the Fourth Circuit affirmed the action of District Judge Hoffman in declining to grant a further delay of one year, as requested by the School Board, to comply with the order of the district court previously entered on February 26, 1957, enjoining the School Board from discriminating solely by reason of race or color.

159 F.Supp. 503; Beckett v. The School Board of the City of Norfolk, supra, and authorities cited therein.

[*Beckett Case*]

At the conclusion of the numerous proceedings and appeals in Beckett, the matter was again before the district court on the individual applications of 151 Negro children for admission into public schools previously attended solely by white children. The School Board initially denied all applications for admission as filed by Negro children, assigning as reasons for such action that (1) the presence of one or two Negro children among a large number of white pupils would create among the Negroes an injurious "sense of isolation," (2) the peculiar circumstances would involve "racial conflicts and grave administrative problems," (3) many of the applicants were scholastically not eligible for considerations of transfer, and (4) as to a limited few Negro pupils, while otherwise qualified, they would be subjected to another transfer in September, 1959, because of a new school to be constructed in the area and "too frequent" transfers are not conducive to proper education. The district judge upheld the Board's reasoning in denying requests for transfer as to pupils classified in the latter two groups, but held that a "feeling of isolation" and "possible racial tension" did not constitute sufficient legal grounds to deny admission to the children otherwise qualified. The Board was then requested to reconsider all of the applications and report to the court; the district judge at all times refraining from making any specific assignments. The members of the School Board, acting in compliance with the law of the land as construed by the United States Supreme Court and as fully explained to them by the district judge, finally reported that seventeen Negro children *would be* assigned to certain public secondary schools of the City of Norfolk which had previously been attended only by children of the white race.[2] On September 27, 1958, following an affirmance of the order of the district court by the United States Court of Appeals for the Fourth Circuit (— F.2d —), at a special session of the latter court that day held at the request of the School Board, the Board assigned the seventeen Negro children to the schools in controversy, and thereupon the Governor of Virginia, purporting to act under § 22-185.5 of the Code of Virginia, issued a proclamation[3] declaring the affected schools closed; divesting the School Board of all authority, power and control over said schools; and assuming as Governor complete authority, power, and control over the schools, its principals, teachers, employees, and pupils enrolled or ordered to be enrolled therein, including the infant plaintiffs, each of whom is a white child enrolled or ordered to be enrolled in one of said schools.

[*Schools Not Opened*]

As the opening of all public schools in the City of Norfolk had been postponed by action of the School Board until September 29, 1958, in order to obtain a final ruling from the United States Court of Appeals for the Fourth Circuit, the six schools referred to have never opened for

2. The secondary schools affected by this action, and the number of Negro children assigned to each school, are as follows:

Maury High School	1 Negro child
Granby High School	1 Negro child
Norview High School	7 Negro children
Northside Junior High School	1 Negro child
Blair Junior High School	2 Negro children
Norview Junior High School	5 Negro children

3. The body of the letter from the Governor to the School Board, its individual members, and the Division Superintendent, is quoted:

"Under compulsion of an order issued by the United States District Court for the Eastern District of Virginia, both white and colored children have been enrolled effective September 29, 1958, in Granby, Maury and Norview High Schools and Blair, Northside and Norview Junior High Schools, located in the City of Norfolk.

"Pursuant to the provisions of Chapter 9.1, Title 22, of the Code of Virginia, the above-named schools are closed and are removed from the public school system, effective September 29, 1958, and all authority, power and control over such schools, principals, teachers and other employees and all pupils now enrolled or ordered to be enrolled, will thereupon be vested in the Commonwealth of Virginia, to be exercised by the Governor.

"Accordingly, by virtue of the authority vested in me as chief executive of the Commonwealth of Virginia, I will thereupon assume all power and control over such schools and hereby request all local officials and all citizens to cooperate with the Department of State Police and local law enforcement officials in the protection of public property and the security of public peace and order.

"You are requested to forthwith notify all teachers, and other personnel connected with such schools, and all parents and other persons having custody and care of all pupils enrolled in such schools, of this action.

"Given under my hand this 27th day of September, 1958.

/s/ J. Lindsay Almond, Jr.
Governor."

the 1958-59 school year. Since September 27, 1958, the only activity permitted has been such as was specifically authorized by the Governor.[4] Approximately 42,000 pupils were enrolled in all public schools in Norfolk prior to the enforcement of the school-closing laws which are the subject of this litigation. Of this number, an estimated 9,900 would have been enrolled in the six schools. No high schools heretofore attended solely by white children are in operation. Three of the four junior high schools formerly attended solely by white children are closed, and the only junior high school in this class remaining open is operating on a segregated basis in excess of its normal capacity. The schools previously and now attended only by Negro children are in full operation, also on a segregated basis, but the seventeen Negro children are not in attendance at any school.

What has happened to the 9,900 white children in the interim? Between 4,200 and 4,500 children are enrolled in various tutoring groups being held in private homes and churches, where they are receiving stopgap instruction in certain basic courses under the guidance of teachers; ninety percent of whom are public school teachers under contract to teach in the six closed schools and whose contractual obligations have purportedly been assumed by the State pursuant to § 22-188.14 of the Code of Virginia, 1950, as amended.[5] There have been 1,621 children officially transferred to other recognized schools, public or private; but the number leaving the state is presently unknown. Approximately 948 children have been transferred to the public schools of South Norfolk, a city contiguous to Norfolk, where the vast majority attend a session beginning at 4 P.M. each day. It is estimated that between 2,500 and 3,000 children are receiving no education or tutoring of any nature.

[*Plight of Children and Teachers*]

The plight of the school children and the teaching personnel who would have been in attendance at the six schools has been adequately described as "tragic." Children who would be in their last year of high school are at a loss as to what to do, and those who had planned to attend college are completely frustrated. The value of a high school diploma is freely recognized, even as to such children who may be admitted to college on examination and without a diploma. Children not having reached the twelfth grade are equally uncertain as to their future. While the record does not reflect the reaction of the children attending other public schools in Norfolk now in operation, it is a proper assumption that at least some of these students and their parents must realize that their schools could be closed at any moment.

In this state of confusion the teachers under contract in the closed schools have endeavored to assist as a temporary measure. But they likewise must look to the future. The morale is at a low ebb; they do not know when, if ever, they will resume the noble profession of educating the youth of Virginia, to which they have dedicated their lives. While their contracts are apparently protected until June 30, 1959, they have no assurance that their services will be renewed for the next succeeding school year. Aside from the financial remuneration they receive, the teachers express the desire to teach in public schools—not merely to assist in some private tutoring group. The testimony points to a feeling of unrest and insecurity among all of the teachers; they are here today, but they will undoubtedly be gone tomorrow unless they are assured with respect to the future. If the teachers leave for a more certain field of endeavor, the public of Norfolk will lose and, even if we were to assume that private tutoring groups would and could continue, the teaching source of supply would be so limited that only a scattered number of children could receive this type of education.

In this setting we approach the statutes under consideration. The adult plaintiffs are all taxpayers and citizens of the Commonwealth of Virginia. With the exception of four adult female plaintiffs, all adult plaintiffs are taxpayers of the City of Norfolk. A portion of the public funds of the state derived from taxation of the adult plaintiffs and other citizens of Virginia is used and applied in the maintenance and operation of the free public school system of Virginia. It is unnecessary for us to discuss the rather complicated formula used by the state in determining the amount allocated for the purpose of public school education in each county and city throughout the state. In some counties the per-

4. The Governor has granted authority to conduct athletic programs in the name of, and at, said schools. He has further permitted non-educational uses of the school properties for meetings, etc.
5. The School Board of the City of Norfolk has already requested payment from the State in the sum of $462,708.00, covering contractual obligations incurred for the months of September and October. As of the date of argument the State had paid nothing on this obligation.

centage of the total budget for public education received from the state will be as high as seventy percent. In the City of Norfolk the percentage of state contribution is slightly in excess of twenty-three percent. By reason of the large number of federally-connected children in Norfolk, the federal government contributes approximately twelve percent of the total budget of $10,354,406.00.

[Brown *Consequences*]

We are not unmindful of the difficulties confronting Virginia and other Southern States following the Brown decision of May 17, 1954. It is not for us to pass upon the wisdom of state legislation, but it is our duty to apply constitutional principles in accordance with the decisions of the United States Supreme Court, and when state legislation conflicts with those constitutional principles, state legislation must yield. Irrespective of what may be said by those in public life, we are gratified to note that counsel for the defendants, including the Attorney General of Virginia, concede that the decisions of the United States Supreme Court are not only binding upon this court, but also constitute the law of the land. If there ever existed any room for doubt as to the controlling force of the principles of law enunciated in Brown v. Board of Education, 347 U.S. 483, 349 U.S. 294, these doubts were effectively removed when, on September 29, 1958, the Supreme Court handed down its opinion in Cooper v. Aaron, 358 U.S. 1, wherein Brown was expressly and unanimously reaffirmed.

In Cooper v. Aaron, supra, we find the following apt statement:

> "It is, of course, quite true that the responsibility for public education is primarily the concern of the states, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. *State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no state shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law.*" (Emphasis supplied)

[*Equal Protection Denied*]

Tested by these principles we arrive at the inescapable conclusion that the Commonwealth of Virginia, having accepted and assumed the responsibility of maintaining and operating public schools, cannot act through one of its officers to close one or more public schools in the state solely by reason of the assignment to, or enrollment or presence in, that public school of children of different races or colors, and, at the same time, keep other public schools throughout the state open on a segregated basis. The "equal protection" afforded to all citizens and taxpayers is lacking in such a situation. While the State of Virginia, directly or indirectly, maintains and operates a school system with the use of public funds, or participates by arrangement or otherwise in the management of such a school system, no one public school or grade in Virginia may be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the state permits other public schools or grades to remain open at the expense of the taxpayers. In so holding we have considered only the Constitution of the United States as it is unnecessary, in our opinion, to pass upon the specific provisions of the Constitution of Virginia which deal directly with the free public school system of the state. We do not suggest that, aside from the Constitution of Virginia, the state must maintain a public school system. That is a matter for state determination. We merely point out that the closing of a public school, or grade therein, for the reasons heretofore assigned violates the right of a citizen to equal protection of the laws and, as to any child willing to attend a school with a member or members of the opposite race, such a school-closing is a deprivation of due process of law. It follows, therefore, that the defendants must be permanently enjoined from enforcing or attempting to enforce the statutes in question as the same may apply to the public schools of the City of Norfolk.

[*Cumming's Case Cited*]

We need only turn back the pages of history to 1899 to find authority for our statement that

these plaintiffs are being denied the equal protection of the laws. When we examine Cumming v. Board of Education, 175 U.S. 528, 542-545, and interpret the same in light of the more recent Brown and Cooper cases, we find abundant reasoning for our conclusions. The Cumming case arose in *Georgia* where a Board of Education, having previously maintained a public high school for the benefit of sixty colored children, elected temporarily to do away with the particular high school and operate, in its stead, a primary school serving three hundred Negro pupils who would otherwise be without the benefit of an education. The evidence disclosed that the Board was without the necessary funds to operate both schools, and that its action in suspending *temporarily* and for *economic* reasons was not a denial of the equal protection of laws. In affirming the Supreme Court of Georgia, Mr. Justice Harlan, speaking for the United States Supreme Court, had this to say:

> "We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified *except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.*" (Emphasis supplied)

In the instant proceeding the six schools are closed solely because of resistance to the law of the land as interpreted by the United States Supreme Court. The underlying reason is, of course, the mixing of races in these schools by the School Board's assignment of seventeen Negro children into schools previously attended only by white pupils. The plaintiffs thereupon became a class created by reason of the operation of the massive resistance statutes. They, together with the seventeen Negro children, are the subjects of discrimination and are unable to obtain the benefits of public taxation on the same basis as the parents of other children similarly situated. The statutes and the action of the defendants thereunder manifestly constitute a clear and unmistakable disregard of rights secured by the Fourteenth Amendment to the Constitution.

[*Principles Applicable Locally*]

In the event the State of Virginia withdraws from the business of educating its children, and the local governing bodies assume this responsibility, the same principles with respect to equal protection of laws would be controlling as to that particular county or city. While the county or city, directly or indirectly, maintains and operates a school system with the use of public funds, or participates by arrangement or otherwise in the management of such a school system, no one public school or grade in the county or city may be closed to avoid the effect of the law of the land while other public schools or grades remain open at the expense of the taxpayers. Such schemes or devices looking to the cutoff of funds for schools or grades affected by the mixing of races, or the closing or elimination of specific grades in such schools, are evasive tactics which have no standing under the law.

We cannot agree with defendants' argument that the closing of these schools constitutes a "temporary" delay in operation. Defendants presented no evidence and did not suggest when, if ever, the schools would be reopened, or as to what steps, if any, were being taken by the Governor to accomplish this purpose. Indeed, Chapter 68 of the Acts of Assembly, Extra Session, 1956, as amended by the Acts of Assembly, 1958, provides that any school in which children of both races are enrolled shall be closed and shall not be reopened as a public school until, in the opinion of the Governor and after investigation by him, he finds and issues an executive order that (1) "the peace and tranquility of the community in which the school is located will not be disturbed by such school being reopened and operated," *and* (2) "the assignment of pupils to such school could be accomplished without enforced or compulsory integration of the races therein contrary to the wishes of any child therein, or of his or her parent or parents, lawful guardian or other custodian." Code of Virginia, 1950, as amended, § 22-188.6. If we were to assume the validity of this statute, it would certainly be chimerical to conclude that the Governor could ever order a reopening of any of the six schools where an effective objection may be registered by any one parent of a child scheduled to attend the school in question. There are a large number of Virginians who are determined that there shall be no mixing of races in public schools under any circumstances,

and who cannot be expected willingly to comply with the anti-discrimination rule established by the 1954 decision of the United States Supreme Court. To anticipate that there would be no objection on the part of any parent to the operation of an integrated school would require us to completely disregard what everyone knows to be the fact. To postpone the reopening of a school until the end of all opposition to racial mixing cannot possibly be regarded as a temporary measure.

[*Statutes Unconstitutional*]

Nor is any relief afforded by § 22-188.12 of the Code of Virginia, 1950, as amended, wherein it is provided that the closed school or schools shall become a part of the public school system of the political subdivision in which the school is located upon a certificate of the school board *and* board of supervisors of the county or council of the city. It should be noted that this statute, as originally enacted in 1956, made it *mandatory* upon the Governor to proclaim the closed school as a part of the public school system of the political subdivision upon certification of *either* the school board *or* the local governing body. The amendment to this statute in 1958 effectively closed the door when it vested in the Governor the *discretion* to make the necessary proclamation by changing the wording "shall so proclaim" to "may so proclaim" and by further providing that *both* the school board and the governing body of the county or city must join in the certificate addressed to the Governor. Aside from the 1958 amendment, the statute clearly violates the rights of citizens under the equal protection provision of the Fourteenth Amendment. It directly violates the statement in Brown where it is said:

> "Such an opportunity [of an education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

[*Lack of Racial Discrimination*]

We are told that, because the schools are closed to *all alike*, both white and colored, there is no discrimination and hence there is no violation of the Fourteenth Amendment. This premise is totally unsound. The discrimination here complained of is the denial of the right of white children to attend public schools which are closed by action of the Governor pursuant to an unconstitutional law enacted by the General Assembly of Virginia, while other white children living in the same state, and within the same political subdivision, are enjoying the educational opportunities afforded them at the expense of all taxpayers, including the parents of the white children locked out of the six schools. We need hardly discuss the factor of race to arrive at the conclusion that this is not equal protection of laws. Equality of treatment is not achieved through indiscriminate imposition of inequalities. Shelley v. Kraemer, 334 U.S. 1. As was said in Henderson v. United States, 339 U.S. 816, 825-826:

> "Discriminations that operate to the disadvantage of two groups are not the less to be condemned because their impact is broader than if only one were affected."

Where a state or local government undertakes to provide public schools, it has the obligation to furnish such education to all in the class eligible therefor on an equal basis. Missouri ex rel. Gaines v. Canada, 305 U.S. 337. As the United States Supreme Court has ruled out any classification by race as a condition of eligibility, it follows that all eligible children must be accorded equal treatment with respect to admission or attendance in public schools, subject to reasonable rules and regulations disassociated with racial questions. The plaintiffs herein, and the class they represent, are not being accorded education on an equal basis.

[*Motions to Dismiss*]

The defendants have filed motions to dismiss this action which require our attention.

The first contention is that this is an action against the Commonwealth of Virginia and, therefore, cannot be maintained by reason of the provisions of the Eleventh Amendment to the Constitution of the United States which prescribes:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

Despite the wording of the amendment, it has been held that the federal courts are without

power to entertain a suit by a citizen of a particular state when instituted against the state of the plaintiff's citizenship. Hans v. State of Louisiana, 134 U.S. 1; Fitts v. McGhee, 172 U.S. 516, 524; Duhne v. New Jersey, 251 U.S. 311, 313; Ex parte New York, 256 U.S. 490.

Defendants readily concede that state officials, including the Governor and Attorney General, are not immune from suit brought to *prevent* their acting under color of authority, purported to be given to them by an unconstitutional enactment, in such a manner as to infringe the constitutional right of individuals. Sterling v. Constantin, 287 U.S. 378; Ex parte Young, 209 U.S. 123; United States v. Lee, 106 U.S. 196; Philadelphia Co. v. Stimson, 223 U.S. 605, 620; Ferris v. Wilbur, 4 Cir., 27 F.2d 262; Orleans Parish School Board v. Bush, 5 Cir., 242 F.2d 156, 160; School Board of City of Charlottesville v. Allen, 4 Cir., 240 F.2d 59. Defendants cite in support of their contention a line of authorities such as Ex parte Ayers, 123 U.S. 443; Hagood v. Southern, 117 U.S. 52; Great Northern Life Ins. Co. v. Read, 322 U.S. 47; Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573; Mine Safety Appliance Co. v. Forrestal, 326 U.S. 371; Ford Motor Co. v. Treasury Department of Indiana, 323 U.S. 459; Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682; Minnesota v. Hitchcock, 195 U.S. 373; O'Neill v. Early, 4 Cir., 208 F.2d 286; and Fleming v. Upper Dublin Public School District, 141 F.Supp. 813. We have reviewed these cases and find that affirmative state action was held to be required in each instance. The language in Ex parte Ayers must be considered in conjunction with the later case of Ex parte Young. In the *Annotated Constitution of the United States of America*, published pursuant to Senate Joint Resolution 69, approved June 17, 1947, we find (p. 933):

> "What remained of the distinction as a limitation upon suits against State officials was dispelled by Ex parte Young, which not only sustained an injunction restraining State officials from exercising their discretionary duties but also upheld the authority of the lower court to enjoin the enforcement of the statute prior to a determination of its unconstitutionality. While Ex parte Ayers and Fitts v. McGhee were not overruled, the inevitable effect of the Young case was to abrogate the rule that a suit in equity against a State official to enjoin discretionary action is a suit against the State, and to convert the injunction into a device to test the validity of State legislation in the federal courts prior to its interpretation in the State courts and prior to any opportunity for State officials to put the act into operation.
>
> "The rule of Ex parte Young applies equally to the governor of a State in the enforcement of an unconstitutional statute. Continental Baking Co. v. Woodring, 286 U.S. 352 (1932); Sterling v. Constantin, 287 U.S. 378 (1932)."

[*Ludley Case Cited*]

The test is correctly stated in the recent case of Board of Supervisors of Louisiana State University v. Ludley, 5 Cir., 252 F.2d 372, wherein an amendment to the Louisiana State Constitution specified certain state officials as "special agents of the State of Louisiana," and withheld the consent of the State to be sued through any action against such officials. In holding that the suit was not one against the State, the court said:

> "Full relief can be obtained from the named defendants without requiring the State to take any affirmative action. This is the test."

It would perhaps be sufficient to answer defendants' argument by referring to the second Brown decision, 349 U.S. 294, where it is said that all provisions of federal, state or local law requiring or permitting such racial discrimination in public education are unconstitutional and any such laws must yield to this principle. As the statutes in question effectively require a continuance of racial discrimination, they are patently unconstitutional. Aside from the foregoing, however, the short answer is that this court, while holding the statutes unconstitutional, is not directing the reopening of the schools. We merely hold that the Governor's proclamation of September 27, 1958, closing the schools was predicated upon an unconstitutional statute and hence is void. The injunction to be issued will simply prohibit the defendants, and all other persons in active concert or participation with defendants who receive or have notice or knowledge of the injunctive order, from in any manner, directly or indirectly, taking any steps in pursuance of the unconstitutional statutes here involved. The effect of this injunction will be tantamount to restoring to the School Board

its rights, duties and obligations which existed prior to the enactment of the unconstitutional statutes, including, of course, its obligation to comply with the order of this court heretofore entered on February 26, 1957, in the Beckett case. The decree to be entered will not restrain the Commonwealth of Virginia in any sense of the word—it will only prevent the defendant state officials and others from endeavoring to enforce the package of unconstitutional laws designed for the purpose of defeating the "law of the land" as expressed in Cooper v. Aaron, supra.

[*Motion to Dismiss Denied*]

What we have just said is abundant authority for denying the motion to dismiss the School Board as a party defendant, as well as holding that this is not an action against the Commonwealth of Virginia. The School Board may not attempt to enforce these unconstitutional acts any more than the Governor or Attorney General. Neither the Board, the other defendants, nor any persons in active concert or participation with defendants, including, of course, the local governing bodies, may resort to evasive schemes which are discriminatory or are designed to evade the court orders. The Board is clearly a proper and necessary party to the proceeding.

As to the motion to dismiss the Attorney General of Virginia, it is our view that he is also a proper party, although undoubtedly not what may be classified as a necessary party. He is the chief law enforcement officer of the Commonwealth. While he is given no specific statutory duties under the statutes in controversy, he is nevertheless charged with the enforcement of the laws of Virginia. To the end that there will be no misunderstanding of our ruling that the questioned statutes are unconstitutional as in violation of the Fourteenth Amendment to the Constitution of the United States, we conclude that the Attorney General is a proper party to this proceeding and should be included within the terms of any injunctive decree to be entered.

An order has this day been signed by the resident judge directing a further hearing for the purpose of considering the form of decree to be entered in this cause.

ORDER

The opinion of the Court in this cause having this day been filed, it is

ORDERED that the Court be reconvened in the courtroom of the United States Court of Appeals for the Fourth Circuit, at Richmond, Virginia, on Friday, January 23, 1959, at 2:30 P.M. for the purpose of considering the form of decree to be entered herein.

Counsel are invited to submit proposed drafts of such decree at any time in advance of argument by delivering or mailing same to opposing counsel and to the individual members of this Court. Judge Sobeloff and Judge Haynsworth will be in Richmond during the interim. Judge Hoffman will be in Norfolk until the morning of January 23, 1959.

INJUNCTIVE DECREE

This action came on for hearing before the court on November 19, 1958; and the court, on January 19, 1959, having filed herein its written opinion on the issues raised at said hearing, it is this 23rd day of January, 1959,

ORDERED, ADJUDGED and DECREED as follows:

1. The opinion of this court filed herein on January 19, 1959, is hereby adopted as its findings of fact and conclusions of law.

2. The several motions to dismiss filed on behalf of the defendants herein be and said motions are hereby denied.

3. The statutes of the Commonwealth of Virginia, commonly designated as Sections 22-188.3, 22-188.4, 22-188.5, 22-188.6, 22-188.7, 22-188.8, 22-188.9, 22-188.10, 22-188.11, 22-188.12, 22-188.13, 22-188.14 and 22-188.15 of the Code of Virginia, 1950, as amended by the Acts of Assembly, Extra Session, 1956, and the Acts of Assembly, 1958, and the proclamation or communication of the Governor to the defendant School Board members and the defendant Superintendent of Schools, dated September 27, 1958, are hereby declared to be in violation of the Fourteenth Amendment to the Constitution of the United States and therefore void.

4. By reason of the foregoing, the defendants J. Lindsay Almond, Jr., Governor of the Commonwealth of Virginia, Albertis S. Harrison, Jr., Attorney General of the Commonwealth of Virginia, Paul Schweitzer, William P. Ballard, Benjamin J. Willis, Francis N. Crenshaw, W. Farley Powers and Mildred J. Dallas, members of the School Board of the City of Norfolk, John J. Brewbaker, Division Superintendent of Schools of the City of Norfolk, and their respective suc-

cessors in office, and The School Board of the City of Norfolk, Virginia, a body corporate, together with their officers, agents and employees, and all other persons in active concert or participation with said defendants or their successors in office, or any of them, who receive or have notice or knowledge of this order, are hereby permanently enjoined from in any manner, directly or indirectly, taking any steps to enforce, operate or execute or continue to recognize those statutes of the Commonwealth of Virginia commonly designated as Sections 22-188.3, 22-188.4, 22-188.5, 22-188.6, 22-188.7, 22-188.8, 22-188.9, 22-188.10, 22-188.11, 22-188.12, 22-188.13, 22-188.14 and 22-188.15 of the Code of Virginia, 1950, as amended by the Acts of Assembly Extra Session, 1956, and the Acts of Assembly, 1958, as well as the aforesaid proclamation or communication of the Governor of Virginia, dated September 27, 1958.

5. The aforesaid defendants and each of them, together with their officers, agents and employees, and all other persons in active concert or participation with said defendants, or their successors in office, or any of them, who receive or have notice or knowledge of this order, are hereby permanently enjoined from in any manner, directly or indirectly, taking any steps or action to discriminatorily close one or more public schools in the City of Norfolk or particular grades therein, solely by reason of the assignment to, or enrollment or presence in, such school or grade of children of different races or colors, while at the same time other public schools are permitted by the defendants to remain open on a segregated basis.

6. So long as the City of Norfolk, directly or indirectly, maintains and operates a school system with the use of public funds, or participates by arrangement or otherwise in the management of such a school system, the defendants Paul Schweitzer, William P. Ballard, Benjamin J. Willis, Francis N. Crenshaw, W. Farley Powers and Mildred J. Dallas, members of the School Board of the City of Norfolk, and John J. Brewbaker, Division Superintendent of the Schools of the City of Norfolk, and their respective successors in office, and The School Board of the City of Norfolk, Virginia, a body corporate, together with their officers, agents and employees, and all other persons in active concert or participation with the said defendants, or their successors in office, or any of them, who receive or have notice or knowledge of this order, are enjoined from engaging in any evasive schemes or devices looking to the cut-off of funds for schools or grades affected by the mixing of races or the closing or elimination of specific grades in such schools.

7. The defendants Paul Schweitzer, William P. Ballard, Benjamin J. Willis, Frances N. Crenshaw, W. Farley Powers and Mildred J. Dallas, members of The School Board of the City of Norfolk, The School Board of the City of Norfolk, a body corporate, and John J. Brewbaker, Division Superintendent of the Schools of the City of Norfolk, are hereby restored to their respective rights, duties and obligations of which they were purportedly deprived by the enactment of the statutes which have been hereinabove declared unconstitutional.

8. The constitutional questions having been determined by the three-judge statutory court, it is further ORDERED that said court be, and it is hereby, dissolved, but said cause is retained upon the docket of the district court for the entry of such further orders and decrees which, to the district court or any judge thereof, may appear reasonably necessary or appropriate in supplementation or for the enforcement hereof; leave being expressly granted any person charged with the duty of compliance herewith (including the School Board of the City of Norfolk and its individual members who have the specific obligation of extending the equal protection of the laws to all of the pupils of the Norfolk public schools) to apply to the court for the entry of such further orders.

9. The defendants' verbal motion for a rehearing is denied.

10. The defendants' verbal motion for a stay of the execution of this decree is denied.

11. The plaintiffs may recover from the defendants their costs of this action.

12. To all of which the defendants object, and their objection is noted of record.

Richmond, Virginia
January 23, 1959

Preliminary Injunction Against Enforcement of Resolutions and Ordinance

On January 27, 1959, in another suit in federal district court in Norfolk, the City Council and City Treasurer were preliminarily enjoined from enforcing the ordinance of November 25, 1958, (supra, p. 41) and the resolutions of December 30, 1958 (supra, p. 43) and January 13, 1959 (supra, p. 44), or otherwise closing schools or grades by any such "evasive scheme" as cutting off funds or eliminating specific grades in schools affected by desegregation.

Ruth Pendleton JAMES, et al. v. W. Fred DUCKWORTH, et al.

United States District Court, Eastern District, Virginia, Norfolk Division, January 27, 1959, Civil Action No. 2892.

HOFFMAN, District Judge.

PRELIMINARY INJUNCTION

This action came on to be heard upon plaintiffs' motion for a preliminary injunction, and upon consideration thereof, it is the 27th day of January, 1959, ORDERED as follows:

1. The memorandum opinion of the Court on said motion, to be filed herein, is adopted as its findings of fact and conclusions of law.

2. Plaintiffs having requested leave of Court to withdraw their motion for a preliminary injunction as to the defendants Paul Schweitzer, Francis N. Crenshaw, William P. Ballard, Benjamin J. Willis, W. Farley Powers, and Mildred J. Dallas, members of the School Board of the City of Norfolk, and the School Board of the City of Norfolk, a body corporate, and John J. Brewbaker, and said defendants having represented to the Court that in the operation of the public schools of the City of Norfolk they would act in compliance with orders of this Court and without discrimination or evasive scheme, leave to withdraw the motion for a preliminary injunction as to said defendants is hereby granted.

3. The Court having found that the actions of the remaining defendants hereinafter referred to constitute an evasive and discriminatory scheme in violation of the Fourteenth Amendment to the Constitution of the United States, and are otherwise illegal, the defendants W. Fred Duckworth, George R. Abbott, Linwood Perkins, Lawrence C. Page, Lewis L. Layton, Roy B. Martin, Jr. and N. B. Etheridge, as members of the Council of the City of Norfolk, Alex H. Bell, as Treasurer of the City of Norfolk, and their respective successors in office, and the Council of the City of Norfolk, together with their officers, agents and employees, and all other persons in active concert or participation with said defendants or their successors in office or any of them, who receive or have notice or knowledge of this order are hereby enjoined, pending final hearing of this action or until further order of this Court.

(a) From taking any action or steps, directly or indirectly, to enforce or apply the provisions of that statute of the Commonwealth of Virginia commonly designated as § 22-127.1 of the Code of Virginia, 1950, as amended by the Extra Session of 1956.

(b) From withholding the funds for public schools heretofore appropriated by Ordinance No. 19,679 of the Council enacted November 25, 1958, and from enforcing, applying or attempting to enforce or apply the conditions or restrictive provisions of Sections 5 and 6 of the said Ordinance or either of them, or from enforcing, applying or attempting to enforce or apply as to the defendant School Board the restrictive provisions of Section 7 of said ordinance, except in the same percentage of reduction as said restrictive provisions are enforced and applied to all departments of the City of Norfolk.

(c) From enforcing, applying, or attempting to enforce or apply, the restrictions upon the use of public school funds contained in resolution adopted by the said Council on December 30, 1958.

(d) From enforcing, applying, or attempting to enforce or apply, the restrictive provisions or requests with respect to the use of public school funds which were expressed or implied in resolution of said City Council adopted January 13, 1959.

(e) From in any manner, directly or in-

directly, taking any steps, or action designed to bring about the closing or continued closing of one or more public schools of the City of Norfolk or particular grades therein by reason of the assignment to, or enrollment or presence in, such schools or grade of children of different races or colors, while at the same time other public schools in the City of Norfolk are permitted to remain open on a segregated basis.

(f) From engaging in any other evasive scheme looking to the cut-off of funds for schools or grades affected by the mixing of races, or because of the presence of children of only one race, or the closing or elimination of specific grades in such schools.

(g) From, in an exercise or purported exercise of police power, closing any school or schools of the City of Norfolk or any class in such schools for more than two consecutive days on any one occasion without prior approval of this Court.

4. The verbal motion of defendants for a stay of the execution of this decree is denied.

5. To all of which said action of the Court the defendants, other than the School Board, its members and Division Superintendent, duly except.

Norfolk, Virginia

January 27, 1959

School Board Resolution of January 29, 1959

On January 29, 1959, the Norfolk School Board directed the Superintendent of Schools to take such action as might be necessary to open six specific high schools.

WHEREAS, on September 27, 1958, the School Board of the City of Norfolk, in conformity to an order of the United States District Court for the Eastern District of Virginia entered September 18, 1958, assigned seventeen Negro children to the following public secondary schools of the City of Norfolk, to-wit: Granby High School, Maury High School, Norview High School, Blair Junior High School, Norview Junior High School and Northside Junior High School; and

WHEREAS, such schools were thereby closed pursuant to the applicable laws of the Commonwealth of Virginia, and all authority and control over such schools, their principals, teachers, employees and pupils was taken from said School Board and vested in the Commonwealth of Virginia, to be exercised by the Governor; and

WHEREAS, by order of the United States District Court for the Eastern District of Virginia entered January 23, 1959 and immediately effective, the said statutes of the Commonwealth of Virginia were declared to be "in violation of the Fourteenth Amendment to the Constitution of the United States and therefore void," and the said School Board and the Division Superintendent of Schools were "restored to their respective rights, duties and obligations of which they were purportedly divested" by the application of the said statutes which were declared unconstitutional, and were enjoined from discriminatorily closing any school because of racial integration; and

NOW, THEREFORE, BE IT RESOLVED by the School Board of the City of Norfolk that the Superintendent of Schools is hereby directed to take such action as may be necessary to open Granby High School, Maury High School, Norview High School, Blair Junior High School, Norview Junior High School and Northside Junior High School on Monday, February 2, 1959.

January 29, 1959

Superintendent's Announcement of January 30, 1959

On January 30, 1959, pursuant to the school board resolution of the previous day, the Norfolk Superintendent of Schools issued instructions for the opening of six specific high schools.

ANNOUNCEMENT OF J. J. BREWBAKER, SUPERINTENDENT OF SCHOOLS

Pursuant to the resolution of the School Board, adopted in special meeting January 29, 1959, the six high schools, Granby, Maury, Norview senior high, Blair, Northside, and Norview junior high, which did not reopen last September, will open at 9:00 A.M. on Monday, February 2, 1959. The pupils in these six schools will be dismissed on Monday at 12:30 P.M. Tuesday, February 3, will be a full school day with lunchrooms open. Instructions for each school for opening are as follows:

GRANBY HIGH SCHOOL

Pupils who attended Granby High School last year should report to old home rooms. New pupils to Granby High School should report to the auditorium.

MAURY HIGH SCHOOL

Pupils who were enrolled at Maury in June should return to their old home rooms. Pupils reporting to Maury for the first time should report to the auditorium.

NORVIEW HIGH SCHOOL

All pupils who have previously attended Norview High should report to their old home rooms.

All Norview Junior High pupils coming to Norview High School for the first time should report to the auditorium.

All pupils new to Norview High should report to the Library on the second floor above the main entrance.

BLAIR JUNIOR HIGH SCHOOL

Pupils who attended Blair last year should report to their old home rooms. New pupils to Blair should report to the auditorium.

NORTHSIDE JUNIOR HIGH SCHOOL

Pupils who attended Northside last year should report to their old home rooms. New pupils to Northside should report to the auditorium.

NORVIEW JUNIOR HIGH SCHOOL

Eighth grade pupils should report to the auditorium. Seventh grade pupils should report to the gymnasium.

All teachers of these schools will report for work on Saturday, January 31, from 9:00 A.M. to 1:00 P.M. This is a special work day for all teachers in the system. No pupils will attend school on this day.

I urge pupils, parents, and all citizens to show sincere understanding and co-operation to assure a smooth orderly opening of these closed schools.

Motion to Dismiss Injunction Suit Denied

Following entry of a preliminary injunction (supra, p. 55), the federal district court in Norfolk on February 3, 1959, considered a motion to dismiss an action brought by numerous minor white children and their parents, to enjoin the Norfolk City Council and City Treasurer from enforcing a Council ordinance of November 25, 1958 (supra, p. 41) and Council resolutions of December 30, 1959 (supra, p. 43) and January 13, 1959 (supra, p. 44) cutting off funds for certain schools and grades affected by desegregation orders. The court found that there was insufficient evidence to support defendants' contention that their actions had been based on a need for economy in operating the public school system. While noting the evidence of threats of violence to persons and damage to valuable school properties, the court reaffirmed the doctrine that the preservation of the public peace cannot operate in such a manner as to cause constitutional rights to be yielded. Concluding that the council's actions amounted to an evasive scheme to perpetuate the program of massive resistance, recently declared unconstitutional [*Harrison v. Day*, —— S.E.2d ——, 4 Race Rel. L. Rep. 65 (Va. 1959), infra; *James v. Almond*, —— F. Supp. ——, 4 Race Rel. L.

Rep. 46 (E.D. Va. 1959), supra], the court held such actions unconstitutional and, therefore, denied the motion.

Ruth Pendleton JAMES, et al. v. W. Fred DUCKWORTH, et al.

United States District Court, Eastern District Virginia, Norfolk Division, February 3, 1959, Civil Action No. 2892.

HOFFMAN, District Judge.

MEMORANDUM

This is another chapter involving the legal skirmishes confronting this and appellate courts following the May 17, 1954, decision in Brown v. Board of Education, 347 U.S. 483, as the same applies to the public schools of the City of Norfolk.[1] To review the history of efforts to avoid the effect of the mandate in Brown would be needless repetition. The background of the present controversy is fully disclosed by reference to the authorities cited in the footnote.

On January 19, 1959, the Supreme Court of Appeals of Virginia rendered its opinion in the case of Harrison v. Day, ____Va.____, ____ S.E.2d ____, declaring as violative of the Constitution of Virginia certain statutes enacted by the General Assembly of Virginia at its Extra Session, 1956, and its Regular Session of 1958. These statutes, among others, have generally been referred to as the "massive resistance laws". On the same day, January 19, 1959, a three-judge district court, convened pursuant to 28 U.S.C. §§ 2281-2284, released its opinion in James v. Almond, ____F.Supp. ____, holding certain statutes enacted by the General Assembly of Virginia as in violation of the Fourteenth Amendment to the Constitution of the United States. The highest court of Virginia, having determined that the statutes were in violation of the State Constitution, found it unnecessary to comment on the contended abridgment of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. The opinion of the three-judge statutory court dealt only with the statutes in light of the Fourteenth Amendment and left for state determination the matters touching the interpretation of the State Constitution.

An announcement from the Supreme Court of Appeals of Virginia on January 2, 1959, to the effect that its opinion in Harrison v. Day would be delivered on January 19, 1959, prompted the three-judge statutory court immediately to state that, in deference to the pending decision by the Supreme Court of Appeals of Virginia, the three-judge court would delay releasing its opinion in James v. Almond until the Virginia court had expressed its views on the subject. The press gave much publicity to these announcements and proceeded to speculate as to the results of the forthcoming decisions. It was the general consensus of opinion that the "massive resistance laws" would be declared unconstitutional by one or both of the judicial bodies. Arguments in both cases were heard during the latter part of November, 1958, and, even at that time, anyone versed in the knowledge of law was cognizant of the fact that the statutes in controversy could not possibly survive the test of equal protection of laws under the Fourteenth Amendment. The President of the Council of the City of Norfolk who testified in this case freely conceded that he was of the opinion the statutes would be declared void.

[*Injunctions Sought*]

The present action, instituted by numerous minor children and their parents of the white race, requests a temporary and permanent injunction against the Council of the City of Norfolk, its individual members, the Treasurer of the City of Norfolk, the School Board of the City of Norfolk, the individual members of the School Board of the City of Norfolk and the Division Superintendent of Schools to enjoin the enforcement and intended enforcement of an ordinance and two resolutions adopted by the

1. For prior decisions of litigation in Norfolk, Virginia, arising out of the Brown holding, see: Beckett v. The School Board of the City of Norfolk, 148 F. Supp. 430; Beckett v. The School Board of the City of Norfolk, 2 Race Rel. L. Rep. 337 (otherwise unreported); The School Board of the City of Norfolk v. Beckett, 4 Cir., 246 F.2d 325; School Board of Newport News, Virginia, et al v. Atkins, et al, 355 U.S. 855 (Newport News and Norfolk cases considered together on application for certiorari); Beckett v. The School Board of the City of Norfolk, 3 Race Rel. L. Rep. 942-964 (otherwise unreported); The School Board of the City of Norfolk v. Beckett, 4 Cir., 260 F.2d 18; James v. Almond, — F. Supp. — (opinion by three-judge court filed January 19, 1959; injunctive decree entered January 23, 1959).

Council cutting off funds for the use of certain schools and grades. At the conclusion of the hearing on the temporary injunction, counsel for said plaintiffs conceded that there had been no showing to justify the issurance of an injunction against the School Board of the City of Norfolk, the individual members thereof, and the Division Superintendent of Schools. All of the testimony points to the fact that whatever action was taken by the Council was independent of the express desires of the School Board. The School Board stands ready and willing to open and operate the public schools of the City of Norfolk in accordance with the law but, for reasons apparent from the history of the litigation and the action of the Council which is the subject of this particular controversy, the Board has been substantially deprived of all of its rights and powers granted to the School Board under the laws of the State of Virginia.

The essence of the complaint, after stating the relationship of the parties and the sundry resolutions or ordinances adopted by the Council, is to the effect that the Council and its members, in adopting and seeking to enforce the resolutions in question limiting the use of appropriations for the use of the public schools of Norfolk, have been and are now engaged in an evasive scheme designed to nullify the lawful orders of this court, and that such action will deprive the minor plaintiffs herein, whose parents are citizens and taxpayers of the City of Norfolk and State of Virginia, of the rights guaranteed to said minor plaintiffs under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

[*Superintendent's Estimate*]

As required by the laws of Virginia and the Charter of the City of Norfolk, the defendant Brewbaker, in his capacity as Division Superintendent of Schools, prepared, with the advice of the School Board, an estimate of the amount of money needed during the next fiscal and calendar year for the support of the public schools of the City of Norfolk.[2] The estimate was approved by the School Board prior to its submission to the City Manager for transmittal to the Council as the tax levying body. The estimate or budget was prepared and submitted under the assumption that all public schools in the City of Norfolk would be open and operating during the year 1959 although, at the time in question, six of Norfolk's secondary schools were closed because of the School Board's assignment of 17 Negro children to previously all-white schools, which brought into operation the now declared unconstitutional statutes enacted by the General Assembly.

[*Council Resolution*]

Prior to consideration of the requested appropriation for public schools, the City Council on September 30, 1958, adopted a resolution directed to the Governor and General Assembly of Virginia requesting that the six secondary public schools, previously closed pursuant to a communication from the Governor dated September 27, 1958, be open and operated under Chapter 69 of the Acts of the General Assembly, 1956, Extra Session.[3] The preamble of the resolution is pertinent to demonstrate the legislative purpose and intent of the City Council as of September 30, 1958, wherein it is said:

> "WHEREAS, Section 129 of the Constitution of Virginia provides that the General Assembly shall establish and maintain an efficient system of public free Schools; and
> "WHEREAS, six of the seven secondary public schools of the City of Norfolk in which white children are taught have been closed by operation of law; and

2. The Charter of the City of Norfolk provides for the submission of the proposed estimate or budget on or before the 1st day of October of each year. Section 109, Charter of the City of Norfolk. Action must be taken by the Council on the total budget, including the requested appropriations for all departments of the City, at least 30 days before the end of each fiscal year (the fiscal year being the calendar year for the City of Norfolk). Section 68, Charter of the City of Norfolk. Apparently the voters of the City of Norfolk are deprived of the benefits provided under Section 22-125 of the Code of Virginia, 1950, as amended, which states that a petition of a certain number of qualified voters may cause the Judge of the Corporation Court, in his discretion, to order an election by the people to be held during the month of June, to determine whether the cash appropriation for schools as fixed by the Council should be in accordance with the amount requested by the Division Superintendent.

3. The provisions of Chapter 69 (§ 22-188.30 through § 22-188.40 of the Code of Virginia, 1950, as amended by the Extra Session, 1956) purport to put in operation a state-established school system under the guidance of the Governor, for and on behalf of the General Assembly. While the statutes would appear to be mandatory wherever action is requested by the local governing body, the Governor did not see fit to exercise the obligations imposed under Chapter 69.

"WHEREAS, it is the earnest desire of the Council of the City of Norfolk that all such secondary schools in the City of Norfolk should continue to operate in order that none of the approximately ten thousand students should be delayed in securing the education prescribed and provided by law for them; and

"WHEREAS, all of the secondary schools in which colored children are taught are in full operation; and

"WHEREAS, it is necessary for the immediate preservation of the public peace, property, health and safety of the City of Norfolk and to provide for the usual daily operation of the Department of Public Schools of the City of Norfolk, that the said closed secondary schools be immediately opened and operated pursuant to the Act of the General Assembly. . . . ."

[*Other Action*]

The six schools having been closed by the Acts of Assembly (declared unconstitutional by the state and federal courts on January 19, 1959), the Council requested the invocation of the state-operated public school system. No action having been taken by the Governor to effect the state-operated system, the schools remained closed throughout the first half of the school year. Contractual obligations purportedly assumed by the State pursuant to § 22-188.14 have been regularly paid by the School Board from funds supplied by the Council, but the State has paid no portion of this commitment which now exceeds $1,000,000.00. The statute, § 22-188.14, being a part and parcel of the unconstitutional "massive resitance laws," the Governor has advised the President of the Council that the money must now be separately appropriated by the General Assembly of Virginia, which apropriation, the Governor has informed the President of the Council, he will recommend. From the evidence adduced at the trial of this case, it is perfectly apparent that Council viewed its prospects of collecting this obligation as considerably aided by its action under the resolution adopted on January 13, 1959, which is the particular resolution under attack herein; the theory being that continued aid to the massive resistance program of Virginia would tend to persuade sympathetic listeners. Whatever may be the merits of this argument, and irrespective of how conjectural it may be, it has nothing whatsoever to do with the financial obligations of the City of Norfolk for the calendar-fiscal year of 1959. The tax rate has been established for the new year and is predicated upon the operation of all public schools. If the City is financially unable to operate by reason of the loss inflicted upon it under the unconstitutional statutes, there are other avenues open for the purpose of securing the needed revenue.[4] Aside from this fact, three Council members testifying herein each admitted that, but for the contemplated violence resulting from integration of the seventeen Negro school children, the budget for schools would have been adopted subject to the customary provisions granting to Council the right to change or cancel the unexpended portion of the amounts and allowances set out in the total budget at any time during the fiscal year.

[*Council's Views*]

The resolution of September 30, 1958, adequately discloses Council's views as to the necessity of operating elementary and secondary public school systems in the City of Norfolk. These views were considerably modified when Council, aware of the pending collapse of Virginia's massive resistance laws, attempted to dictate what schools and grades would be operated on and after February 2, 1959. However, it is admitted by the City Attorney that it is not the function of Council to determine what schools or grades should be operated as a part of the school system of the city. That is a function exclusively reserved to the School Board. Sec. 22-97(6), Code of Virginia, 1950. The School Board's authority in this respect has been usurped by Council's resolution of January 13, 1959, hereinafter discussed. Indeed, the City Attorney conceded in argument that the Council's function with respect to the school system is apparently limited to its right to appoint or reappoint members of the School Board as and when vacancies exist or terms of office

4. § 22-124 of the Code of Virginia, 1950, prohibits the governing body from reducing the appropriation during any school term, except by the same percentage of reduction as all other appropriations are reduced. § 22-195 of the Code of Virginia, 1950, authorizes the *school boards* of the cities of Hampton and Norfolk, and the town of Lexington, to charge tuition, under regulations prescribed by the State Board, for pupils attending *high schools*. The tax levy for a subsequent year may be increased to make up the deficit caused by state action.

expire,[5] and its right to appropriate funds consistent with the needs of the school system and the financial ability of the city to meet such requirements through the imposition of taxes.

Manifestly, a federal court ordinarily has no right or power to interfere with appropriations made by the Council for use by the School Board. There is, however, an exception to this rule where the purpose and intent of Council is clearly to flaunt the law of the land and avoid the effect of lawful court orders by participating in a scheme or device to attain its objective. As the three-judge court said in James v. Almond, supra:

> "Such schemes or devices looking to the cutoff of funds for schools or grades affected by the mixing of races, or the closing or elimination of specific grades in such schools, are evasive tactics which have no standing under the law."

And in Cooper v. Aaron, 358 U.S. 1, 17, we find:

> "In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislatures or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' Smith v. Texas, 311 U.S. 128, 132."

That the rule as stated is equally applicable to the Council in this case is effectively stated in Brown v. Board of Education, 349 U.S. 294, 298, as follows:

> "All provisions of federal, state, or local law requiring or permitting such discrimination [racial discrimination in public education] must yield to this principle."

5. Under the provisions of § 22-89, Code of Virginia, 1950, the terms of office of two members of the School Board expire annually on June 30. As Norfolk has two separate school districts, there are six members, two of whom become eligible for reappointment or may be replaced annually. While the ultimate long range control of the School Board is undoubtedly vested in the Council through the power of appointment, the intent of the General Assembly to remove the School Board as far as possible from politics is clearly stated by the Supreme Court of Appeals of Virginia in Board of Sup'rs. v. County School Board, 182 Va. 266, 28 S.E.2d 698, 702.

[*Question Posed*]

Should the action of the Council herein be classified as an evasive scheme attempted "ingeniously or ingenuously" to perpetuate segregation in public schools?[6] The answer is obvious under the rule in James v. Almond, supra. Undeniably the will of the majority of the people of the City of Norfolk is for a continuation of segregated schools. Nevertheless, the will of the majority must likewise yield to constitutional principles until and unless there be an amendment to the Constitution.

Reverting to the Extra Session of the General Assembly of Virginia held in September, 1956, it will be noted that, among many other laws enacted at that time touching upon the racial problem, were two statutes relating to appropriations by local governing bodies for schools and the right of the governing body to direct the cessation of expenditures for school funds.[7]

6. Immediately following the entry of the injunctive decree, the Council issued a public statement reading in part as follows:
"The Council, pursuant to the expressed will of the majority of the people whom it represents, has endeavored to stand against what it considers to be an abridgment of constitutional rights guaranteed to it and the citizens of Norfolk. The action of the United States District Court, unless reversed on appeal, prevents the Council from doing what it deems to be in the best interests of the City, but, pending the outcome of the appeal which will be taken, the Council must abide by the order of the District Court."

7. § 22-127 of the Code of Virginia, 1950, as amended by the 1956 Extra Session, is as follows:
"In lieu of making such school levy, the governing body of any county or city may, in its discretion, make a cash appropriation, either tentative or final, from the funds derived from the general county or city levy of an amount not less than the sum required by the county or city school budget provided for by § 22-122 and approved by the governing body of the county or city, but in no event to be less than the minimum nor more than the maximum amount which would result from the laying of the school levy authorized by the preceding section for the establishment, maintenance and operation of the schools of the county or city and for the payment of grants for the furtherance of elementary or secondary education and transportation costs. In addition to this, the governing body of any county or city may appropriate, either tentatively or finally, from any funds available, such sums as in its judgment may be necessary or expedient for the establishment, maintenance and operation of the public schools in the county or city and for the payment of such grants and transportation costs required or authorized by law.
"Whenever any such appropriations have been made on a tentative basis, no part of the funds so appropriated shall, in any event, be

While these statutes appear to conflict with § 22-124 of the Code of Virginia, 1950, which restricts the right of the governing body to decrease, at any time during a school term, the amount appropriated for schools for such term, except by the same percentage of reduction as all other appropriations are reduced, it is unnecessary to determine the constitutionality of § 22-127 and § 22-127.1. The presumption of constitutionality carries with it the corresponding presumption that it will be constitutionally applied. Shuttlesworth v. Birmingham Board of Education, 162 F.Supp. 372, 384, affirmed upon the limited grounds therein stated, 358 U.S. 101. Surely the General Assembly of Virginia could not have intended that § 22-127 and § 22-127.1 would be unconstitutionally applied to avoid the law of the land through the medium of an evasive scheme or device.

[*Budget Adopted*]

Following the enactment of § 22-127 and § 22-127.1, the Council adopted its budget for the fiscal year beginning January 1, 1957, the following language appearing for the first time in the history of the city:

> "Section 4:—The appropriations in said Annual Budget, as approved, for the maintenance and operation of public schools, are made on a tentative basis, and the Council reserves the right to change or cancel the unexpended portion of the same at any time during said fiscal year."

When the foregoing ordinance was adopted on November 27, 1956, the Beckett case was then before this Court. For the fiscal year beginning January 1, 1958, the same language was contained in the budget ordinance adopted November 26, 1957. The adoption of the school budget for the fiscal years 1957 and 1958 on a "tentative" basis was never changed during those years —nor were the appropriations reduced or stopped in any manner.

For the fiscal year beginning January 1, 1959, adopted November 25, 1958, the Council inserted in its Annual Budget the following:

> "Section 5:—That, by reason of the present legal situation with regard to the operation of the public schools of the City, the appropriation herein made for said public schools is made on a tentative basis, and no part of the funds so appropriated shall, in any event, be available to The School Board of the City of Norfolk except as the Council may, from time to time, by resolution authorize the payment or transfer of such funds, or any part thereof, to said School Board.
>
> "Section 6:—That the appropriation herein made for the public schools of the City is made on a tentative basis; that the Council reserves the right to cancel the unexpended portion of said appropriation for public schools at any time during said fiscal year; and that the Council reserves the right to prohibit the expenditure of the unexpended portion, or any part thereof, of said appropriation for public schools."

The foregoing ordinance similarly provided for a severability clause under Section 10 to protect the remaining portions of the budget in the event any section, sentence or clause, be declared unconstitutional or void. In all of its budget ordinances since the year 1945, the severability clause did not appear until the budget for the fiscal year 1959 when it became apparent that the "massive resistance laws" were about to be declared unconstitutional.

[*Resolutions Adopted*]

On December 30, 1958, the Council adopted a resolution authorizing the transfer of $1,098,000 to the School Board for the use of said School

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available to the local school board except as the local governing body may, from time to time, by resolution authorize the payment or transfer of such funds, or any part thereof, to such local school board."

§ 22-127.1 of the Code of Virginia, 1950, as amended by the 1956 Extra Session, is as follows:

"Notwithstanding any other provision of law to the contrary, the governing body of any county, city or town which has made a levy for school purposes under § 22-126 or § 22-129 or has made a cash appropriation under § 22-127 or any other provision of law may by resolution direct the school board of such county, city or town and the treasurer of such county, city or town to make further expenditures of local school funds until further authorized to do so by such local governing body. Any school board, and each member thereof, and any treasurer who makes any expenditure of local school funds after being so directed not to make such expenditures shall be personally liable to make restitution to the county, city or town involved of the funds so expended in violation of any such resolution of the local governing body and may be removed from office under the provisions of article 3 (§ 15-500 et seq.), Chapter 16, Title 15, of the Code."

Board during the month of January, 1959, but further stipulated that "no part of said sum shall be disbursed for the normal daytime operation of the schools now under the control of the Governor of Virginia without his prior approval."

Thereafter, on January 13, 1959, the Council adopted a further resolution.[8] After reciting in the preamble certain provisions of the budget ordinance adopted November 25, 1958, relating to schools, the resolution continues:

"WHEREAS, it is necessary for the immediate preservation of the public peace, property, health and safety and for the usual daily operation of the Department of Finance that the sense of the Council with respect to the maintenance and operation of the public schools of the City of Norfolk be immediately stated, an emergency is set forth, defined and declared to exist, pursuant to Section 15 of the Norfolk Charter of 1918; now, therefore,

"BE IT RESOLVED by the Council of the City of Norfolk:

"Section 1: That the public welfare of the City of Norfolk requires the maintenance and operation of grades 1 through 6, both inclusive, as the public schools of said City.

"Section 2: That the Council does not propose, at this time, to authorize the payment or transfer to The School Board of the City of Norfolk, for use by it during the month of February, 1959, or during any month subsequent thereto for the maintenance and operation of any grade higher than the sixth grade, of any part of the funds tentatively appropriated for the public schools of the City of Norfolk by the annual appropriation ordinance of the City of Norfolk for the fiscal year 1959, adopted November 25, 1958; and that said School Board is hereby requested to make such arrangements as may be necessary to maintain and operate, beginning February 2, 1959, only grades 1 through 6, both inclusive.

"Section 3: That the City of Norfolk will assume payment of the salaries and wages of the employees of said School Board which become due and payable after February 2, 1959, under contracts between said School Board and its employees in effect on February 2, 1959, and which are not otherwise paid or provided for.

"Section 4: That the City Clerk is hereby directed to transmit a certified copy of this resolution to each member of said School Board and to the Division Superintendent of Schools of the City of Norfolk.

"Section 5: That this resolution, being an emergency resolution, shall be in effect from and after its adoption."

[*Resolution's Effect*]

The effect of the resolution of January 13, 1959, if carried out, would not only continue closed the six schools previously locked by reason of the "massive resistance laws," but would also deprive approximately 7,000 additional children of the benefits to be derived from a public school education. A total of approximately 17,000 school children would be without public schools to attend—about 40% of the total normal school attendance in the City of Norfolk. The irreparable damage is obvious and requires no further discussion.

The resolution directly violates the provisions of § 22-126 of the Code of Virginia, 1950, as amended, wherein the city is authorized to raise money by a tax on all property, subject to local taxation, at such rate as may be deemed sufficient, "to be expended by the local school authorities in establishing, maintaining and operating as in their judgment [the local school authorities] the public welfare requires. . ." The Council has seen fit to declare what the public welfare requires with respect to the schools and grades to be maintained and operated. This it cannot do as such right and power is reserved to the School Board. Code of Virginia, 1950, as amended, §§ 22-93, 22-97(6), 22-97(12). Board of Sup'rs. v. County School Board, supra. Constitution of Virginia, §136. As previously suggested, the members of the School Board are unanimous in their view that the public welfare requires the maintenance and operation of the 12 grades which were functioning prior to the effectiveness of the "massive resistance laws" closing six of the secondary schools.

The evidence presented by three members of the Council point to an economy move, but this is not seriously urged as all admit that, but for the assignment of the 17 Negro children to previously all-white schools, the finances of the

8. Six of the seven members of Council voted for the resolution. Councilman Roy B. Martin, Jr., voted against the resolution.

city are sufficient to support the normal 12 grades. Moreover, the city has assumed the payment of all contractual obligations of the School Board which comprises 92% of the total cost of operation. While the President of the Council takes issue with the Division Superintendent as to this estimate by endeavoring to compare school operation with that of a private business, he has no figures to contradict same, and a glance at the school budget clearly discloses that the Division Superintendent was remarkably accurate in his estimate. Thus, for a saving of 8% of the budget, the Council seeks to completely eliminate the expenditure of funds for 10 schools operating grades 8 through 12, both inclusive (classified as junior and senior high schools), and reduce the expenditure of funds for 32 other schools which maintain the seventh grade. It requires no argument to point out that the saving as to the 32 schools would be negligible as these schools would continue in operation for the purpose of serving grades 1 through 6. As to the remaining ten schools, the contractual obligations having been assumed by the city under its resolution, the saving would be *de minimis* as these schools, even in an idle status, must maintain a certain amount of heat, light, water, and other necessities. This Court finds that the intent and purpose of Council in adopting its resolution of January 13, 1959, was not associated with any need for economy in operation of the public school system.[9]

[*Threats to Persons and Property*]

This brings us to a consideration of the main force of Council's argument which is the threat of violence to persons and possible damage to school properties valued at many millions of dollars.[10] The President of the Council testified that he had received 50 to 100 anonymous telephone calls threatening violence to schools in which Negro children were assigned, and to schools attended solely by Negro children if permitted to remain open while previously all-white schools were closed. Presumably these calls were received prior to the action of the Supreme Court of Appeals of Virginia in Harrison v. Day. Even if the good faith of Council may be assumed, the argument falls by reason of the decided authorities holding that the preservation of the public peace cannot operate in such manner as to cause constitutional rights to be sacrificed or yielded. Buchanan v. Warley, 245 U.S. 60, 81; Cooper v. Aaron, supra. Indeed, the President of the Council was unable to answer the inquiry as to how the City of Norfolk could ever operate a school attended by members of both races under such circumstances.

As the President of the Council stated that he would not want to operate any schools where there are threats of violence, and as § 17 of the Charter grants certain powers to the President, with the consent of the Council in time of public danger or emergency, this Court has seen fit to include in the preliminary injunction a reasonable limitation upon the possible abuse of the exercise of that police power. While undoubtedly the police power is an inherent attribute of the sovereignty, it is well settled that its use is limited by the spirit and letter of the Constitution to prevent an unconstitutional exercise of that power. Jacobson v. Massachusetts, 197 U.S. 11, Buchanan v. Warley, supra; Faubus v. United States, 8 Cir., 254 F.2d 797, 805; Aaron v. Cooper, 8 Cir., 257 F.2d 33, 40, affirmed sub nom. Cooper v. Aaron, 358 U.S. 1.

[*Massive Resistance*]

The clear purport of Council's action is tantamount to an evasive scheme or device seeking to perpetuate the program of massive resistance in the public schools of the City of Norfolk. It violates the laws of Virginia, as well as the laws and Constitution of the United States. The only alternative rests in the issuance of a preliminary injunction to prevent the Council from taking such action as will deprive the School Board of its rights, powers, duties and obligations conferred upon it by the laws of Virginia, and from "ingeniously or ingenuously" whittling away or

9. While the motive of a legislative body is not the proper subject of inquiry by a court, it is well settled that the legislative purpose and intent may be properly considered. NAACP v. Patty, 159 F. Supp. 503, 515, and authorities therein cited; Hudson v. American Oil Co., 152 F.Supp. 757, 770; Adkins v. School Board of the City of Newport News, 148 F.Supp. 430, 434. And see the recent decision of the Supreme Court of Appeals of Virginia in Board of County Sup'rs. of Fairfax County v. Davis, — Va. —, 106 S.E.2d 152, 157 (decided December 1, 1958).

10. Exactly how this theory could be maintained as to the 32 schools in which the seventh grade would be eliminated is not clear as no Negro child has been assigned to previously all-white schools in the 32 schools mentioned. Presumably Council was endeavoring to avoid discrimination as the majority of schools in the system are maintained on a 6-3-3 basis. The discrimination would nevertheless exist. James v. Almond, supra.

watering down the orders of this Court which have heretofore become final and affirmed on appeal in several instances.

Disposing of the motion to dismiss, it would perhaps be sufficient to again refer to James v. Almond, supra. Clearly, however, this is not an action against the state under the Eleventh Amendment to the Constitution of the United States. The statutes (§ 22-127 and § 22-127.1) are permissive and not mandatory, which precludes the necessity of a three-judge court. Ex parte Collins, 277 U.S. 565. The statutes refer only to local school funds. Hamilton Gas Light Co. v. Hamilton City, 146 U.S. 258, restricted its decision to the interpretation of state laws impairing the obligation of contracts. In Mayor of City of Savannah v. Holst, 5 Cir., 132 Fed. 901, the facts presented no dispute about the construction of the Constitution or laws of the United States, and were confined to questions dependent for their solution on the laws of Georgia. Cf. Barney v. City of New York, 193 U.S. 430, as qualified and restricted by Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278, in which latter case it is said:

> "But, as we have already pointed out, it was long since settled that acts done under the authority of a municipal ordinance passed in virtue of power conferred by a State are embraced by the Fourteenth Amendment."

The end result of Home Telephone & Telegraph Co. v. Los Angeles, supra, is to apply to municipal ordinances the same limitations placed upon state officers in Ex parte Young, 209 U.S. 123. Barney v. City of New York, supra, has been discredited by later decisions (as noted above and Raymond v. Chicago Traction Co., 207 U.S. 20, 37; Snowden v. Hughes, 321 U.S. 1).

The motion to dismiss is denied.

February 3, 1959.

Norfolk, Virginia.

EDUCATION
Public Schools—Virginia

Albertis S. HARRISON, Jr., Attorney General of Virginia v. Sidney C. DAY, Jr., Comptroller of Virginia.

Supreme Court of Appeals of Virginia, January 19, 1959, No. 4929.

SUMMARY: The Attorney General of Virginia petitioned the state Supreme Court of Appeals for a writ of mandamus to compel the comptroller to issue warrants to reimburse local school boards for disbursements made for tuition grants for the education of children in private schools. The validity of the proposed payments depended on whether the Virginia constitution was violated by state statutes designed to prevent public school integration, and under which a school, upon being integrated or policed by federal authority, would be automatically closed and state funds would be cut off from that school and used for tuition grant payments for the education of affected children in nonsectarian private schools. 1 Race Rel. L. Rep. 1091-1094, 1097, 1103-1106 (1956); 3 Race Rel. L. Rep. 341-342, 767 (1958). The Attorney General argued that since the section in the state constitution requiring segregated schools had been invalidated by the *School Segregation* decisions, all other sections in the same constitutional article, including one requiring that "The General Assembly shall establish and maintain an efficient system of public free schools throughout the State," also fell, leaving the General Assembly unrestricted by the state constitution in dealing with public schools. The court, however, found nothing in the constitution or its history to indicate that every other section in the educational article was intended to be conditioned upon the validity of the segregation section. The 1956 constitutional amendment authorizing the General Assembly to appropriate funds for the education of children in private schools was held not to empower the Assembly to withhold funds from some public schools and appropriate those funds for the payment of tuition grants, because that action would violate the

constitutional mandate that the state "maintain" efficient public schools "throughout the state." The court declared the contested legislation unconstitutional for purporting to authorize such action. No constitutional objection to making tuition grants out of funds properly available for such purpose was found, but as there were presently no such funds, the court denied the writ. Two justices dissented.

EGGLESTON, Chief Justice.

ORIGINAL PETITION FOR WRIT OF MANDAMUS

This is a petition for a writ of mandamus filed in this court by the Attorney General against the Comptroller, pursuant to Code, § 8-714, to determine the validity of a number of related acts of the General Assembly affecting the operation of the public schools throughout the Commonwealth. The proceeding was instituted when the Comptroller, in a letter to the Attorney General, expressed doubt as to the validity of certain provisions in the acts and the regulations of the State Board of Education authorizing the issuance of warrants by the Comptroller to reimburse local school boards for the State's share of disbursements made for the payment of tuition grants, to be expended in furtherance of the elementary and secondary education of Virginia students in nonsectarian private schools. The matter is before us on the pleadings and the exhibits filed therewith, and the issue is whether the statutes involved violate certain provisions of the Constitution of Virginia and the fourteenth amendment to the Federal Constitution.

The several acts involved are summarized in the margin. [1]

[*Plan's Purpose*]

It will be observed that the stated purpose of the plan embodied in these acts is to prevent the enrollment and instruction of white and colored children in the same public schools. To that end, all elementary and secondary public schools in which both white and colored children are enrolled are, upon the happening of that event, automatically closed, removed from the public school system, and placed under the control of the Governor. All State appropriations for the support and maintenance of such schools are cut off and withheld from them. Such State funds so withheld, and certain other funds raised by local levies, are to be used for the payment of tuition grants for the education in nonsec-

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(1) Act of 1956, Ex. Sess., ch. 68, p. 69 (Code, 1958 Cum. Supp., § 22-188.3 *ff.*).

Section 1 of the Act declares that if and when the school authorities of the various political subdivisions of the Commonwealth are ordered to enroll white and colored children in the same public schools, such enforced integration of the races "could destroy" the efficiency of the school and "would tend to disturb the peace and tranquility of the community in which such school is located." Code, 1958 Cum. Supp., § 22-188.3.

Section 2 declares that "the welfare of all the citizens of the Commonwealth, the preservation of her public school system and a continuance of universal public education, make it necessary that there be uniformity of action throughout the State in all instances where school authorities acting voluntarily, or under compulsion," enroll white and colored children in the same public school. Code, 1958 Cum. Supp., § 22-188.4.

Section 3 provides that from and after September 29, 1956, the Commonwealth "assumes direct responsibility for the control of any school, elementary or secondary," to which children of both races are assigned and enrolled by any school authorities acting voluntarily or under compulsion of any court order. It further provides that the making of such an assignment and the enrollment of such child or children "shall automatically divest the school authorities making the assignment and the enrollment of all further authority, power and control over such public school, its principal, teachers and other employees, and all pupils then enrolled or ordered to be enrolled therein; and such school is closed and is removed from the public school system, and such authority, power and control * * * shall be and is hereby vested in the Commonwealth of Virginia to be exercised by the Governor * * *." Code, 1958 Cum. Supp., § 22-188.5.

Sections 4 and 5 specify certain duties of the Governor with respect to a possible reorganization of any school which may be closed and removed from the public school system by operation of the foregoing provisions. Section 6 empowers the Governor to reassign the children in such closed school to any available public schools where such an assignment is practicable. Code, 1958 Cum. Supp., §§ 22-188.6, 22-188.7, 22-188.8.

Section 7 authorizes the Governor and the local school authorities to make tuition grants in limited amounts to those children who cannot be reassigned to other public schools out of funds which would otherwise have been available for the operation of such closed school. Such grants are to be expended for the education of such children in nonsectarian private schools. Code, 1958 Cum. Supp., § 22-188.9.

Section 9 and Section 10 (as amended by Acts of 1958, ch. 631, p. 939) prescribe the conditions under which the control of an affected school may be restored to the public school system and its operation, control and maintenance returned to the local school board. Code, 1958 Cum. Supp., §§ 22-188.11, 22-188.12.

(2) Act of 1956, Ex. Sess., ch. 69, p. 72 (Code, 1958 Cum. Supp., § 22-188.30 *ff.*). This Act is a corollary to the Act of 1956, Ex. Sess., ch. 68, p. 69, supra, and requires the establishment by the State of an

tarian private schools of children who have been attending such public schools, who cannot be assigned to other public schools, and whose parents or custodians desire that they do not attend schools in which both white and colored children are enrolled and taught. Schools which may be policed under federal authority, or disturbed by such policing, are, upon the happening of that event, likewise automatically closed, and, under related statutes, tuition grants are made available for pupils who have been attending such schools.

[*Question Presented*]

The immediate question presented is whether the plan meets the requirements of the Constitution of Virginia.

In his opening brief the Attorney General took the position that the mandatory requirement of Section 129 of the Constitution that "The General Assembly shall establish and maintain an efficient system of public free schools throughout the State," is no longer effective and binding, because, he said, Section 129 is predicated upon the validity of Section 140 which provides that "White and colored children shall not be taught in the same school," and that when Section 140 was invalidated by the decision of the Supreme Court of the United States in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, this "necessarily entailed the simultaneous emasculation of Section 129 and its extirpation from the organic law of the Commonwealth."

When it was argued in the brief of the respondent that the statutory plan also violates the provisions of Sections 130, 133, 135 and 136, Article IX, of the Constitution, the Attorney General amended his position and contended in his reply brief and in his oral argument before us, that all of the other provisions in Article IX dealing with "Education and Public Instruction," like Section 129, are predicated upon the right of the Commonwealth, as embodied in Section

efficient system of elementary and secondary public schools in any school division in which such a system is not operated under local authority, provided "the local governing body" adopts a resolution stating such condition and declaring the need for such State operated system. Code, 1958 Cum. Supp., § 22-188.30.

Section 2 of the Act declares that "an efficient system" of elementary and secondary public schools "means and shall be only that system within each county, city or town in which" no elementary or secondary school "consists of a student body in which white and colored children are taught." Code, 1958 Cum. Supp., § 22-188.31.

Under Sections 5 and 6, such "State established public free school system shall be administered by the Governor for the General Assembly" under the supervision of the State Board of Education. Code, 1958 Cum. Supp., §§ 22-188.34, 22-188.35.

According to Section 4 such State system shall use and be housed in the "unused school buildings and related facilities" owned and maintained by the local school boards. (Code, 1958 Cum. Supp., § 22-188.33.) Under Section 11 such schools are to be financed in part out of levies to be made by the localities, paid into the State treasury, and expended by the State Board of Education in such localities. Code, 1958 Cum. Supp., § 22-188.40.

(3) Act of 1958, ch. 642, p. 967 (not codified). Items 130 to 161, both inclusive, of this, the Appropriation Act, appropriate funds for school purposes, but with certain limitations and conditions thereon embodied in a preamble of eight unnumbered paragraphs (pages 989-990). In the first of these paragraphs there is a legislative declaration and finding of fact that "the mixing of white and colored children in any elementary or secondary public school within any county, city or town of the Commonwealth constitutes a clear and present danger affecting and endangering the health and welfare of the children and citizens residing in such county, city or town, and that no efficient system of elementary and secondary public schools can be maintained in any county, city or town in which white and colored children are taught in any such school located therein."

The second and third paragraphs of the preamble define an "efficient system" of elementary and secondary public schools, respectively, as "only that system within each county, city or town in which" no school "consists of a student body in which white and colored children are taught."

The fourth paragraph of the preamble provides that the General Assembly, for the purpose of protecting the health and welfare of the people and in order to preserve and maintain an efficient system of public elementary and secondary schools, declares it to be the policy of the Commonwealth "that no public elementary or secondary schools in which white and colored children are mixed and taught shall be entitled to or shall receive any funds from the State Treasury for their operation, and, to that end, forbids and prohibits the expenditure of any part of the funds appropriated by Items 137, 138, 141, 142 and 147 of this section for the establishment and maintenance of any system of public elementary or secondary schools, which is not efficient."

These items are for the stated purposes:

Item 137: For the establishment and maintenance of local supervision of instruction in efficient elementary and secondary schools, including visiting teachers, to be apportioned among such schools by the State Board of Education.

Item 138: For basic appropriation for salaries of teachers employed only in efficient elementary and secondary schools.

Item 141: For salary equalization of teachers employed only in efficient elementary and secondary schools.

Item 142: For providing a minimum educational program in efficient elementary and secondary schools only.

Item 147: For pupil transportation to and from efficient elementary and secondary schools only.

The eighth and final paragraph of the preamble

140, to operate segregated public free schools, and that when Section 140 fell under the axe of the Brown case, all of the provisions in Article IX became inoperative. He thus summarized his position:

> "In light of what has been said, it is manifest that racially integrated public schools and schools comprising an inefficient system are beyond the scope of Article IX of the Virginia Constitution and are not comprehended by any of the provisions of that Article. This is so, not because schools of this character were unknown and given no consideration by the framers of the Virginia Constitution, but because such schools *were* considered by the framers, were found to be fundamentally objectionable, and were consequently excluded from the ambit of Article IX entirely. It follows that no racially integrated public schools and no schools comprising a system deemed to be inefficient by the General Assembly can find any warrant for existence or possess any standing whatever under the Virginia Constitution."

In short, the Attorney General says, the General Assembly now has plenary power to deal with the public free school system in any manner it may deem fit, unfettered by any requirements of, or limitations in, the Constitution of Virginia.

[*Constitution Examined*]

The provisions of the Constitution do not permit the matter to be so summarily disposed of. In the first place, there is no word or suggestion in any provision in Article IX, or elsewhere in the Constitution, that these provisions which were incorporated in the Constitution along with Section 140 are conditioned upon the validity of that section. It would have been a simple matter to have qualified the mandate of Section 129 by

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permits all State funds withheld under these provisions to be used for (1) the payment of salaries and wages of "unemployed teachers in State aid teaching positions, and other public school employees, who are under contract;" and (2) "for educational purposes which may be expended in furtherance of elementary and secondary education of Virginia students in nonsectarian private schools, as may be provided by law."

(4) Act of 1956, Ex. Sess., ch. 56, p. 56 (Code, 1958 Cum. Supp., § 22-115.19, note), makes available to localities funds to be expended for the payment of tuition grants. Under its terms such grants are payable out of the funds appropriated to the localities but withheld from them under the provisions of the Appropriation Act of 1956 (Acts 1956, ch. 716, pp. 1074, 1096).

Section 3 of the later Act authorizes the State Board of Education to promulgate rules and regulations for the payment of such grants.

(5) The Act of 1956, Ex. Sess., ch. 57, p. 57 (Code, 1958 Cum. Supp., § 22-115.1 *ff.*), authorizes any locality wherein no levy or appropriation is made for the operation of public schools, to provide for a limited levy and collection of taxes to be expended by the school board in payment of tuition grants for the furtherance of the elementary or secondary education of children of such locality in nonsectarian private schools. Such educational funds are to be expended by the local school boards in payment of such grants.

(6) The Act of 1956, Ex. Sess., ch. 58, p. 59 (Code, 1958 Cum. Supp., § 22-115.10 *ff.*), establishes the procedure by which various localities are required under specified conditions to make tuition grants to qualified pupils attending nonsectarian private schools. Section 2 requires the local authorities to include in their school levy or appropriation sufficient amounts to provide for the payment of tuition grants. Code, 1958 Cum. Supp., § 22-115.11.

Under Section 3 such funds shall be expended by the local school board in payment of grants for the furtherance of the elementary or secondary education of the children of such county, city or town in nonsectarian private schools to parents or custodians of children who have been assigned to, or are in attendance at, public schools wherein both white and colored children are enrolled. In order to secure such grants the parents or custodians must make affidavit that they object to the assignment of such children to, or their attendance upon, such mixed schools. Code, 1958 Cum. Supp., § 22-115.12.

Under Section 4 the total amount of each such annual grant, together with any tuition grant received from the State, shall not exceed the total cost of operation per pupil in average daily attendance in the public schools of the locality making such grant as determined for the preceding school year by the Superintendent of Public Instruction. Code, 1958 Cum. Supp., § 22-115.13.

Under Section 7 local school boards may promulgate rules and regulations, not inconsistent with those of the State Board of Education, to carry out the purpose of the Act. Code, 1958 Cum. Supp., § 22-115.16.

Section 10 provides that whenever a locality fails and refuses to make such grants the State Board of Education shall authorize and direct the Superintendent of Public Instruction to provide for the payment of such grants from funds appropriated by the State for distribution to that locality. Code, 1958 Cum. Supp., § 22-115.19.

(7) The Act of 1956, Ex. Sess., ch. 62, p. 62 (Code, 1958 Cum. Supp., § 22-115.20), authorizes local school boards to expend for tuition grants school funds designated for public school purposes without first obtaining the authority therefor from the local tax levying bodies.

(8) Act of 1958, ch. 41, p. 26 (Code, 1958 Cum. Supp., § 22-188.41 *ff.*).

Section 2 of the Act provides that whenever, except upon application of the General Assembly, or the Governor, any military forces or other federal personnel shall enter upon the premises of any

stating that the obligation to establish and maintain an efficient system of public free schools was expressly conditioned upon the segregation of children of the two races, or to have so defined an "efficient system." Similarly, by appropriate language, the other provisions in Article IX could have been expressly conditioned upon the validity and operation of Section 140. This was not done.

[*Constitutional Convention Debates*]

In the next place, there is nothing in the Debates of the Constitutional Convention to indicate that the framers intended that Section 140 was to have this effect. Article VIII, § 3, of the Constitution of 1869 had provided for the establishment of a public free school system in this language: "The general assembly shall provide by law, at its first session under this constitution, a uniform system of public free schools, and for its gradual, equal and full introduction into all the counties of the state, by the year 1876, or as much earlier as practicable." In the Convention of 1901-02 there was considerable debate in reframing this provision in the language of Section 129 of the present Constitution. Likewise, there was considerable discussion of what are now Section 130, dealing with the function of the State Board of Education, and Sections 133, 135 and 136 dealing with the local administration of schools, the State appropriations for school purposes, and the levying and expending of local school taxes. There is nothing in the debates on these sections to indicate that their validity or operation was to be conditioned upon the validity of Section 140.

[*Framers' Intent*]

It is true that the framers of the Constitution of 1902 intended that white and colored children should not be taught in the same public schools. That is the plain purpose and intent of Section 140. They had been assured by Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256, decided in 1896, just five years before the members of the Convention assembled, that this was permissible under the Fourteenth Amendment. The Debates of the Convention also show that Section 140 was adopted without discussion.[2] It is extremely unlikely that this would have been accomplished had the framers intended, as the Attorney General argues, that all of the provisions in the Constitution dealing with educational matters were predicated upon the validity of Section 140.

In considering other provisions relating to educational matters there was discussion as to whether some of the members of the General Assembly, in carrying out the mandate of the Constitution of 1869 for the establishment of a system of public free schools, favored mixed schools.[3] But beyond this, the subject of mixed or segregated schools was not discussed.

Moreover, if it be "manifest," as the Attorney General contends, that all of the provisions in Article IX with respect to public education became inoperative when the decision in the Brown case struck down Section 140 of the Constitution, surely that view would have been presented to this court when we had under consideration in Almond v. Day, 197 Va. 419, 89 S.E.2d 851 (decided in 1955 after the decision in the Brown case), the power of the General Assembly under Section 141, as it then read, to

public school, or in the vicinity thereof, for the purpose of policing its operation, or to prevent acts of violence, or alleged acts of violence, "the school shall thereupon automatically be closed and its operation suspended." Code, 1958 Cum. Supp., § 22-188.42.

By the terms of Sections 3 and 4 the Governor is directed to "assume all control and exercise all authority" with respect to such school, its operating personnel and pupils, and the powers and duties of the local authorities are automatically suspended. Provision is made for the payment of tuition grants by the local authorities to the children in such closed school who cannot be reassigned to other public schools. Code, 1958 Cum. Supp., §§ 22-188.43, 22-188.44.

Section 5 specifies the conditions upon which such school may be reopened and its control returned to the local authorities Code, 1958 Cum. Supp., § 22-188.45.

(9) The Act of 1958, ch. 319, p. 367 (Code, 1958 Cum. Supp., § 22-188.46 *ff.*), authorizes the Governor to close additional schools in any school division wherein a school has been closed under the provisions of Chapter 41 of the Acts of 1958, *supra*, and to assume full control thereof. It divests the local authorities of their powers and duties with respect to such school. As in the preceding Act (Acts 1958, ch. 41, *supra*), provision is made for the payment of tuition grants by the local authorities for children who have been attending the closed school and cannot be reassigned to other public schools. Code, 1958 Cum. Supp., §§ 22-188.46, 22-188.47, 22-188.48.

The closing paragraph of the Act specifies the conditions upon which such closed school may be reopened and its operation restored to the local authorities. Code, 1958 Cum. Supp., § 22-188.49.

2. Debates of Constitutional Convention (1902), p. 1237.

3. Debates of Constitutional Convention (1902), p. 1086 *ff.*

appropriate funds for the education of war orphans in private schools.

[*1956 Amendment*]

Furthermore, why then was it necessary that a constitutional convention be held in 1956 to amend Section 141 so as to authorize the appropriation of funds for the education of Virginia students in nonsectarian private schools? If the Attorney General be correct in his position, the General Assembly, at that time, had plenary power to deal with the public school system as it saw fit and no constitutional authority by amendment to Section 141 was necessary.

It is earnestly contended by the Attorney General that the meaning, intent and purpose of Section 129 of the Constitution should be ascertained by resort to extrinsic evidence, especially with regard to the circumstances surrounding its adoption. This is contrary to the general principle that construction of a constitutional provision is required only when the language is ambiguous or obscure in meaning. 4 Mich. Jur., Constitutional Law, § 18, p. 101 *ff*.

The language of Section 129 is clear and positive in its terms and provisions. Its meaning and intent are found in the language of the section itself; language so simple and positive as to require no resort to extrinsic evidence.

We are not permitted to speculate on what the framers of that section might have meant to say, but are, of necessity, controlled by what they did say. There being no doubtful or ambiguous words or terms used, we are limited to the language of the section itself and are not at liberty to search for meaning, intent or purpose beyond the instrument. And where, as here, the intent is expressed in clear and unmistakable language, we cannot be influenced by whether we deem the provision to be wise, expedient, or desirable. Almond v. Gilmer, 188 Va. 1, 29, 49 S.E.2d 431, 446.

[*Education Sections Still Valid*]

We hold that Section 140 and the other sections in Article IX, including Section 129, dealing with public education, are independent and separable, and that the destruction of Section 140 by the decision in the Brown case did not strike down the other provisions in Article IX. If it be desirable that all of the provisions dealing with the public school system be stricken from the Constitution, it should be done by proper amendments to the Constitution in the manner therein provided. It should not be done by judicial construction. The aim of judicial construction, and also its limitation, is to determine the meaning of what has been written, not to delete sections from the Constitution on the theory that if conditions had been different they would not have been written.

Our view that Sections 129 and 140 of the Virginia Constitution are independent and separable is supported by the recent holding of the Supreme Court of North Carolina in Constantian v. Anson County, 244 N.C. 221, 93 S.E.2d 163. That case involved the similar question whether the invalidation by the decision in the Brown case of the provision in the North Carolina constitution requiring that white and colored children be taught in separate public schools, also invalidated the constitutional provision requiring the general assembly to provide for a system of public schools. Both of these provisions are incorporated in section 2 of article IX of that constitution.

The court pointed out that the first sentence of this section, providing for the establishment of a system of public schools, was ratified in 1868, and the second, providing for the segregation of the races, was added by an amendment adopted by the Constitutional Convention of 1875. It concluded that the decision in the Brown case had affected these constitutional provisions to this extent:

> "• • • Only that portion of the 1875 amendment which purports to make *mandatory* the *enforced* separation of the races in the public schools is now held violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Otherwise, the mandates of Article IX, sections 2 and 3, remain in full force and effect. The provisions thereof, absent the mandatory requirement of enforced separation, are complete in themselves and capable of enforcement. Their separable and independent status is manifest. They antedate the 1875 amendment. They survive the invalidation of the mandatory requirement of enforced separation contained in the 1875 amendment." (93 S. E.2d, at page 168.)

[*Constitution Construed*]

While Section 129 of the Virginia Constitution requiring the General Assembly to "establish

and maintain an efficient system of public free schools throughout the State" is still in the organic law and must be complied with, that section should be read in connection with Section 141 as amended by the Convention of 1956. The material portion of Section 141, as amended, reads:

> "No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; * * *."

It will be observed that under Section 141, as amended, the General Assembly has permissive authority to appropriate funds for the education of Virginia students in nonsectarian private schools. The language is that it "may" appropriate funds for that purpose. On the other hand, Section 129 imposes a mandatory duty on the General Assembly to establish and maintain an efficient system of public free schools throughout the State. The language of Section 129 is that it "shall," that is, it *must*, appropriate funds for the latter purpose. Board of Supervisors v. Cox, 155 Va. 687, 707, 156 S.E. 755; School Board v. Shockley, 160 Va. 405, 412, 168 S.E. 419.

Clearly, the language of Section 141, as amended, contemplates that if State funds are to be devoted to the education of Virginia students in nonsectarian private schools, the General Assembly should make the necessary appropriation therefor. The purposes of Section 141 may not be accomplished at the expense of some public free schools by withholding State funds from their support, and devoting such funds to the payment of tuition grants, as is attempted under the provisions of the Appropriation Act of 1958. (Acts 1958, ch. 642, p. 989.)

This device leaves such schools from which the supporting funds are withheld and diverted entirely without the State support required by Section 129 of the Constitution. That section requires the State to "*maintain* an efficient system of public free schools *throughout the State*." (Emphasis added.) That means that the State must support such public free schools in the State as are necessary to an efficient system, including those in which the pupils of both races are compelled to be enrolled and taught together, however unfortunate that situation may be.

[*Statutes Unconstitutional*]

It follows, then, that the provisions of the Act of 1956, Ex. Sess., ch. 68, p. 69 (Code, 1958 Cum. Supp. § 22-188.3 *ff.*), and the provisions of the Appropriation Act of 1958, ch. 642, p. 989, violate Section 129 of the Constitution in that they remove from the public school system any schools in which pupils of the two races are mixed, and make no provision for their support and maintenance as a part of the system.

It is argued that the closing of schools under these provisions is merely temporary. But the acts do not so provide, and the fact that provision is attempted to be made for the education in private schools of children who have been attending these interrupted schools indicates that the condition may be prolonged. Indeed, it is a matter of common knowledge that under the provisions of these acts a number of schools in several localities in the State have been closed for months.

As an alternative to his main contention that Section 129 is no longer binding on the General Assembly, the Attorney General argues that the provisions of the Act of 1956, Ex. Sess., ch. 68, p. 69 (Code, 1958 Cum. Supp., § 22-188.3 *ff.*), and the provisions of the Appropriation Act of 1958 (Acts 1958, ch. 642, p. 989), just discussed, do not violate Section 129. Here, his argument runs thus: While Section 129 requires the maintenance of an "efficient system" of public schools it does not define the term, but leaves that to the determination of the General Assembly; that body has said that such a system means "only that system without each county, city or town" in which no elementary or secondary school "consists of a student body in which white and colored children are taught,"[4] and hence the plan satisfies the constitutional requirement.

4. Acts of 1958, ch. 642, at page 989; Acts of 1956, Ex. Sess., ch. 69, § 2, at page 73; Code, 1958 Cum. Supp., § 22-188.31.

We agree that the General Assembly may determine what is an "efficient system," but it cannot by definition impair or disregard constitutional requirements. It is elementary that unless the context suggests otherwise, words in the Constitution are to be given their usual plain or ordinary meaning. 4 Mich. Jur., Constitutional Law, § 9, p. 96. Applying this principle, it is clear that the word "efficient," as used in Section 129, embraces other factors beyond those in the statutory definition. Among such other factors are a sufficient number of schools with adequate buildings and equipment, a sufficient number of competent teachers, and other basic matters associated with the public school system. While the mixing of the races is a factor which may impair the efficiency of the system, the separation of the races alone will not, as the statutory definition implies, constitute an "efficient system."

[*Other Acts Invalid*]

Again, the Act of 1956, Ex. Sess., ch. 68, p. 69 (Code, 1958 Cum. Supp., § 22-188.3 *ff.*), providing for the closing of schools because of integration, divesting local authorities of all power and control over them, and vesting such authority in the Governor, violates Section 133 of the Constitution which vests the supervision of local schools in the local school boards. School Board v. Shockley, *supra*, 160 Va., at page 409.

Similarly, the Act of 1956, Ex. Sess., ch. 69, p. 72, (Code, 1958 Cum. Supp., § 22-188.30 *ff.*), providing for the establishment and operation of a State school system to be administered by the Governor and under the supervision of the State Board of Education, violates Section 133.

Section 11 of this Act (Code, 1958 Cum. Supp., § 22-188.40) directs that local levies authorized under the Act be paid into the State treasury to be expended by the State Board of Education in such localities. This runs counter to Section 136 of the Constitution which requires that local school taxes be expended by the "local school authorities."

The Act of 1958, ch. 41, p. 26 (Code, 1958 Cum. Supp., § 22-188.41 *ff.*), and the Act of 1958, ch. 319, p. 367 (Code, 1958 Cum. Supp., § 22-188.46 *ff.*), provide for the closing of schools in communities which may be disturbed because of the presence in, and policing of, such schools by federal troops and personnel. Under the provisions of these chapters such schools are automatically closed. When a school is closed under these provisions all authority over it is taken from the local school authorities and vested in the Governor. (Code, 1958 Cum. Supp., §§ 22-188.43, 22-188.44, 22-188.47, 22-188.48.) While we agree that the State, under its police power, has the right under these conditions to direct the temporary closing of a school, the provision divesting the local authorities of their control and vesting such authority in the Governor runs counter to Section 133 of the Constitution.

[*Tuition Grant Procedure Valid*]

We find no constitutional objection to the prescribed procedure for making tuition grants out of funds properly available for the purpose.[5] Section 141 of the Constitution, as amended, authorizing State and local appropriations for this purpose places no restriction on the manner in which this is to be done, thus leaving it to the discretion of the General Assembly.

Having reached the conclusion that certain provisions of the acts with which we are concerned violate the provisions of the Constitution of Virginia in the several respects stated, it is not necessary that we consider the question whether these acts likewise violate the provisions of the fourteenth amendment to the Federal Constitution as interpreted by the recent decisions of the Supreme Court of the United States in Brown v. Board of Education, *supra*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, and Aaron v. Cooper, U.S.—, 78 S.C.—, 3 L.Ed.—.

There is no occasion for us to discuss these decisions other than to say that we deplore the lack of judicial restraint evinced by that court in trespassing on the sovereign rights of this Commonwealth reserved to it in the Constitution of the United States. It was an understandable effort to diminish the evils expected from the decision in the Brown case that prompted the enactment of the statutes now under review.

Since the warrants proposed to be drawn by the Comptroller are payable out of State funds which have been improperly withheld from certain public free schools in the State, under the provisions of the Appropriation Act of 1958 (Acts 1958, ch. 642, p. 967) and the Act of 1956,

5. See the following acts summarized in footnote 1, *supra*: Acts of 1956, Ex. Sess., ch. 56, p. 56 (Code, 1958 Cum. Supp., § 22-115.19, note; *Id.*, ch. 57, p. 57 (Code, 1958 Cum. Supp., § 22-115.1 *ff.*); *Id.*, ch. 58, p. 59 (Code, 1958 Cum. Supp., § 22-115.10 *ff.*); *Id.*, ch. 62, p. 62 (Code, 1958 Cum. Supp., § 22-115.20).

Ex. Sess., ch. 68, p. 69 (Code, 1958 Cum. Supp., § 22-188.3 *ff.*), and since there are no other State funds available for the purpose, the writ prayed for is denied.

WRIT DENIED.

Miller and Snead, JJ., dissenting.

Dissent

MILLER, J., Dissenting:

The ultimate legal question presented in this case is whether or not certain enactments of the General Assembly of Virginia enumerated and summarized in the majority opinion, which authorize the making of tuition grants under specific circumstances therein stated, violate the State or the Federal Constitution. Under these enactments the occurrence of certain enumerated events over which the General Assembly can exercise no control but deemed by it to be wholly incompatible with the maintenance of an *efficient* system of public free schools, causes funds otherwise appropriated for the operation of public schools within the affected area to become available for tuition grants to pupils irrespective of race who elect to attend non-sectarian private schools.

[*Agrees in Part*]

I agree with that part of the majority opinion that recognizes the authority and constitutional right of the General Assembly under § 141 of the Constitution of Virginia, as amended in 1956, to provide by appropriate legislation for the expenditure of public funds for the payment of tuition grants for the education of Virginia pupils in non-sectarian private schools. In fact, the State's power to appropriate funds for the payment of such grants *per se* is not in issue; both litigants agree that the General Assembly has that authority. I, however, disagree with that part of the opinion which holds that §129 of the Virginia Constitution is still effective and operative and that the several challenged acts are violative of that section, and as a result denies to the Comptroller the right to make payment of such tuition grants. The validity of the acts that authorize tuition grants depends, in my judgment, upon whether the mandate of §129 was suspended and rendered inoperative by the decision of the Supreme Court of the United States in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, which suspended the operative effect of § 140 of the Virginia Constitution.

[*Brown Invalidated All*]

My conclusion is that when that decision rendered § 140 inoperative, it necessarily rendered § 129 inoperative. I am convinced that § 129 was intended by the Constitutional Convention that adopted it to be dependent upon the *effective* operation of § 140. Thus my fundamental disagreement with the majority opinion is that it does not accord to § 129 the manifest intent and purpose of the Constitutional Convention which adopted it simultaneously with the plain mandate embodied in § 140. Holding § 129 to be operative gives to the decision of Brown v. Board of Education, supra, the effect of imposing an *affirmative* mandate upon the General Assembly of Virginia to operate a system of public free schools though that system be inefficient. The majority opinion makes of § 129, along with §§ 133, 135, and 136 of Article IX, an instrument by which the General Assembly is required to do what § 140, simultaneously adopted, forbade it to do in clear and positive language.

[*Virginia Court's Authority*]

It is elementary that the right and authority to interpret and construe our constitutional provisions rests with us. Our construction is final and not subject to review. In order to arrive at the proper construction we should ascertain the purpose and object sought to be attained by the framers of the Constitution so as to make effective the intent of the people who adopted it.

Section 129 is the initial provision of Article IX relating to education and public instruction. It ordains that:

> "The General Assembly shall establish and maintain an efficient system of public free schools throughout the State."

The framers did not intend to impose upon the General Assembly the duty and obligation to maintain a system of public free schools without more. Section 129 specifically imposed the duty to maintain *an efficient system.* That is the only character of school system that the General Assembly was required to maintain. It was the only system it could thereafter lawfully maintain; that and none other. What constituted an

efficient system of public free schools was left to the wisdom of that body except in the one particular that was then and there, with the same breath, embodied into the basic law of the Commonwealth. Section 140 of the same Constitution declared that:

> "White and colored children shall not be taught in the same school."

These two sections, one imposing a positive duty, the other prohibiting a power, were contemporaneous, adopted simultaneously. Section 140 was intended by the framers to prohibit a system that would be inefficient *per se*. All other sections of Article IX deal with the financial, operative and administrative means, functions and procedure by which an efficient system might be maintained. When read together, as they must be, §§ 129 and 140 have the following effect: (a) impose upon the General Assembly the obligation to maintain an efficient system of public free schools, and (b) deny to the General Assembly the right to maintain integrated schools.

[*Rules of Construction*]

Then what was the effect upon § 129 when § 140 was rendered inoperative by a superior power as distinguished from being repealed by the usual process to accomplish that result? The admonition of Justice Gregory, speaking in Board of Supervisors v. Cox, 155 Va. 687, 704, 156 S.E. 755, is illuminating.

> "No single section of the Constitution should be construed alone, but consideration given to the instrument as a whole, and, so far as possible, all provisions harmonized.
>
> * * *
>
> "An elementary rule of construction is that all related provisions of a constitution or statutes must be considered and read together in construing one provision. * * *" (At page 707)

The answer to the question whether the Constitutional Convention intended that § 129 be operative though § 140 be rendered inoperative by a superior power may be found by resort to history, to prior legislative acts disclosing the public policy of Virginia and the Debate in the Constitutional Convention that adopted these fundamental provisions. However, before that is done, it is well to recognize the underlying motivation for the adoption of a Constitution by a sovereign state, the office of such basic and fundamental law, and the accepted and recognized rules for its interpretation. Their recital will reveal their pertinency to the inquiry in hand. They have been recently stated by this court in Dean, et al. v. Paolicelli, et al., 194 Va. 219, 226, 72 S.E.2d 506.

[*Dean Opinion Quoted*]

> "The office and purpose of the constitution is to shape and fix the limits of governmental activity. It thus proclaims, safeguards and preserves in basic form the pre-existing law, rights, *mores*, habits and modes of thought and life of the people as developed under the common law and as existing at the time of its adoption to the extent as therein stated. Commonwealth v. Newport News, 158 Va. 521, 164 S.E. 689; Virginia, etc., R. Co. v. Clower, 102 Va. 867, 47 S.E. 1003.
>
> "Its interpretation and construction are to be made with recognition of the fact that it is based upon and announces the fundamental theory and principles of sovereignty and government as developed under the common law. 4 Michie's Jurisprudence, Constitutional Law, sec. 7, p. 94; Commonwealth v. Newport News, supra.
>
> "The constitution must be viewed and construed as a whole, and every section, phrase and word given effect and harmonized if possible. Barbour v. Grimsley, 107 Va. 814, 61 S.E. 1135; Portsmouth v. Weiss, 145 Va. 94, 133 S.E. 781; Funkhouser v. Spahr, 102 Va. 306, 46 S.E. 378; Board of Sup'rs v. Cox, 155 Va. 687, 156 S.E. 755.
>
> "Purpose, meaning and force must be accorded both of these sections of the constitution and to all of their provisions unless they be irreconcilably contradictory and repugnant. State v. Harden, 62 W. Va. 313, 58 S.E. 715, 60 S.E. 394; Board of Sup'rs v. Cox, supra.
>
> "The purpose and object sought to be attained by the framers of the constitution is to be looked for, and the will and intent of the people who ratified it is to be made effective. May v. Topping, 65 W. Va. 656, 64 S.E. 848."

[*Constitutional Construction Principles*]

Principles to be observed in constitutional construction are thus stated in 11 Am. Jur., Constitutional Law, §§ 61, 63:

"The fundamental principle of constitutional construction is to give effect to the intent of the framers of the organic law and of the people adopting it. * * *

"It has been very appropriately stated that the polestar in the construction of Constitutions is the intention of the makers and adopters.

"Wherever the purpose of the framers of a Constitution is clearly expressed, it will be followed by the courts. Even where terms of a constitutional provision are not entirely free from doubt, they must be interpreted as nearly as possible in consonance with the objects and purposes in contemplation at the time of their adoption, because in construing a constitutional provision, its general scope and object should be considered.

* * *

"It is settled by very high authority that in placing a construction on a Constitution or any clause or part thereof, a court should look to the history of the times and examine the state of things existing when the Constitution was framed and adopted, in order to ascertain the prior law, the mischief, and the remedy. A constitutional provision must be presumed to have been framed and adopted in the light and understanding of prior and existing laws and with reference to them. *Constitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adoption, the general spirit of the times, and the prevailing sentiments among the people.* * * *

"Construction based on custom, usage, or the conclusions of the courts must be properly subordinated to the time factor of the creation of the Constitution itself, and later usages cannot override a patent intention expressed at an earlier date. Thus, neither statutes enacted nor judicial opinions rendered since the adoption of a Constitution can impute a different meaning to it than that obviously intended at the time the Constitution was adopted." (Emphasis added.) 16 C.J.S., Constitutional Law, § 30, p. 101; Almond v. Day, 197 Va. 782, 91 S.E.2d 660.

[*State Public Policy*]

Though § 140 has been rendered inoperative, it has not been repealed; it bespeaks the public policy of Virginia at the time of its adoption and it proclaims the basic ideas and desires of the people of this day.

"'The Constitution is not to be construed in a technical manner, but in ascertaining its meaning we are to consider the circumstances attending its adoption, and what appears to have been the understanding of the people when they adopted it,' and we then only announced a rule of interpretation which had been frequently adopted." Bonaal v. Yellott, et al., 100 Md. 481, 60 A. 593. State v. Donald, 160 Wis. 21, 151 N. W. 331.

Section 140 was compatible with the Federal Constitution when adopted.[1] This compatibility was confirmed many years later.[2] For more than fifty years this compatibility was unquestioned. The Federal Constitution had been authoritatively construed to sanction the prohibition of this section. Now that § 140 has been rendered inoperative by a superior power, can § 129 operate as a mandate to the General Assembly to establish a school system forbidden by § 140?

[*Constitution of 1869*]

The Constitution of 1869, commonly called the Underwood Constitution, required the State to maintain a system of public free schools, but was silent upon the subject whether the races should be separated. This is understandable. The public policy of the Commonwealth was in eclipse. The obvious reason is temperately, yet forcefully, stated in respondent's brief.

"* * *It is well established that the convention of 1869 was largely composed of non-Virginians and of freedmen. * * *"

The avoidance of the terms "scalawag" and "carpetbagger" is to be commended.

Yet the General Assembly under this mandate, in the exercise of wisdom, even in the shadows,

1. Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138; 41 L.Ed. 256 (1896).
2. Gong Lum v. Rice, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172 (1927).

immediately declared the public policy of Virginia on July 11, 1870, by legislation forbidding the mixing of the races in public schools. This provision, Acts 1869-1870, ch. 259, p. 413, is as follows:

> "* * * [P]rovided, that white and colored persons shall not be taught in the same School, but in separate schools, under the same general regulations as to management, usefulness and efficiency; * * *"

[*Convention of 1901-1902*]

It is common knowledge that the able and independent Constitutional Convention of 1901-1902 was not of like mind with the Convention of 1869 when it undertook to provide for the establishment of an efficient public free school system in Virginia. The eclipse had passed. The native public policy had supplanted the alien. This accounts for the absence in one Constitution of the requirement of racial separation and its presence in the other.

I do not agree with the majority opinion in finding nothing in the Debates of the Constitutional Convention of 1901-1902 to indicate that the mandate of § 129 was to be dependent upon the effective operation of § 140. It should be borne in mind that § 129 required the maintenance of an *efficient* public school system while Article VIII, § 3, Constitution of 1869, imposed no such obligation. In the Debates of 1901-1902 it is obvious that the establishment of an *efficient* system was the Convention's purpose. It is equally plain that separation of the races in the schools was deemed a necessary and indispensable condition for attaining that object.

In presenting to the Convention the report of the Committee on Education, Dr. Richard McIlwaine, chairman of that committee, discussed Article IX before the individual sections were given consideration by the Convention sitting as a committee of the whole. With respect to the report the chairman declared:

[*Committee Report*]

"Its execution is finally committed to the General Assembly. It is an efficient system of public free schools that we are trying to obtain. Of course, the *fundamental law on this subject lies at the basis of efficiency*, but we must trust the efficient execution of an efficient law to those who have the carrying out of these principles and their enactment." [Emphasis added.) 1 Debates of the Constitutional Convention of Virginia (1901-1902), p. 1051.

With respect to § 140 he observed:

> "The next section is entirely new, and I suppose that there will be very few, if any, who will dissent from it:
> "White and colored children shall not be taught in the same school."

This prophetic announcement proved wholly true, for when the provision was called for independent consideration by the chairman of the Convention, it was adopted without discussion or dissent.

Despite the absence of discussion on § 140, which its ultimate unanimous adoption convincingly discloses was due to the unanimity of opinion as to its significance, value and necessity, discussion of § 129 reveals the critical view of the delegates toward the failure of the alien Convention of 1869 to adopt a similar provision. A forceful criticism, with an observation of the significance of such failure, was thus expressed by Carter Glass:

> "Mr. Chairman, I wish to call the attention of the delegate from Montgomery to one point. Perhaps it is not a valuable occupation of time to do it, but he has been glorifying the Underwood Constitution and objecting to the first clause of our report here upon the ground that the Republican party established the free school system in Virginia.
> "I wish to call his attention to the fact that the first system proposed by the Republicans under the Underwood Constitution was one that would have absolutely made it impossible to have had any public schools in the State of Virginia, because it contemplated that there should be mixed schools; that negroes and white people should be taught together, and they refused to establish public schools at first because that was not done." 1 Debates of the Constutional Convention of Virginia, 1901-1902, p. 1086, *et seq.*

[*Majority Opinion Examined*]

The majority opinion points out that the mandate of § 129 is not qualified by a statement in the Constitution that the operative effect of that section is conditioned upon the

validity of § 140 and that provisions of Article IX could have been expressly conditioned upon the validity and operation of § 140.

Little comfort, if any, can be obtained from the fact that § 129 and other provisions of Article IX are not qualified by or expressly conditioned upon the validity and operation of § 140. First, the Constitutional Convention had the right to believe, and undoubtedly did believe, that § 140 was valid and operative, and would so remain. There was no need or object to be accomplished by making such a statement. Second, though the mandate embodied in § 129 is not expressly conditioned upon the operative effect of § 140, yet when well recognized principles of constitutional interpretation and construction are observed and adhered to, it is plain that such operative effect was necessarily intended by the framers of these two sections.

> "In ascertaining both the intent and general purpose, as well as the meaning, of a constitution or part thereof, it should be construed as a whole. As far as possible, each provision should be construed so as to harmonize with all the others, with a view to giving effect to each and every provision in so far as it shall be consistent with a construction of the instrument as a whole." 16 C.J.S., Constitutional Law, § 23.
>
> "In view of the rule, discussed supra § 14, that the meaning of a constitution is fixed when it is adopted, the construction given it must be uniform, so that the operation of the instrument will be inflexible, *operating at all times alike, and in the same manner with respect to the same subject; and this is true even though the circumstances may have so changed as to make a different rule seem desirable, since the will of the people as expressed in the organic law is subject to change only in the manner prescribed by them.* * * *" (Emphasis added) 16 C.J.S., Constitutional Law, § 37.

Correct principles of constitutional interpretation and construction avoid a result that (a) brings provisions of a constitution into conflict, or (b) make of the constitution a shifting and uncertain instrument. The majority opinion, by enforcing the mandate of § 129 without regard to the prohibition simultaneously embodied in § 140, ignores and neglects to apply these fundamental principles. It thus brings provisions of the Constitution into direct conflict and imposes upon § 129 a different operative effect from what it had or could have had when adopted.

[*Long-Standing Public Policy*]

The habits and customs, the sentiment and established public policy of Virginia, obtaining for ninety years or more, point to the inevitable conclusion that it was the intent of the framers of § 129 that its mandate upon the General Assembly to maintain an efficient system of public free schools was to be dependent upon the protective and indispensable prohibition of § 140.

In the majority opinion it is stated:

> "We agree that the General Assembly may determine what is an 'efficient system,' but it cannot by definition impair or disregard constitutional requirements. It is elementary that unless the context suggests otherwise, words in the Constitution are to be given their usual plain or ordinary meaning. 4 Mich. Jur., Constitutional Law, § 9, p. 96. Applying this principle, it is clear that the word 'efficient,' as used in Section 129, embraces other factors beyond those in the statutory definition. Among such other factors are a sufficient number of schools with adequate buildings and equipment, a sufficient number of competent teachers, and other basic matters associated with the public school system. While the mixing of the races alone will not, as the statutory defiiciency of the system, the separation of the races alone will not, as the statutory definition implies, make it an 'efficient system'."

I am in accord with all of the foregoing paragraph except the last sentence. In fact, I heartily agree that a "sufficient number of schools with adequate buildings and equipment" and sufficient competent teachers are not only factors embraced within the concept of an efficient school system, but they are *indispensable* factors. Lacking either one or any other *necessary* factor, the system cannot be efficient. But be that as it may, the Constitutional Convention deemed separation of the races to be so indispensable to an efficient system that it embodied that provision into the organic law, and the General Assembly has also determined and declared that integrated schools, or schools patroled by and subject to the discipline of federal troops are not and can-

not be efficient. Unless the judgment of the legislative branch in that respect is arbitrary, capricious, unreasonable and without foundation, the judicial branch is not authorized to substitute its judgment, whatever it may be, to supplant the finding and declaration of the General Assembly in that respect.

In view of the fact that § 129 no longer imposes any duty upon the General Assembly to maintain public free schools, the provisions of all other sections of the Constitution having to do with such schools, they being predicated upon the obligation imposed by § 129, now inoperative, to establish and maintain an *efficient* system or none at all, necessarily become inoperative. They become inoperative because the mandate of § 129 has become inoperative.

[*Assembly's Plenary Powers*]

This leaves the General Assembly possessed of plenary and unfettered powers, drawn from its inherent reservoir of sovereignty, to do as it pleases with reference to public schools in this State.

> "As the state legislature is the supreme law-making body within the state, it can enact any law not prohibited by state or federal constitution * * *
>
> * * * * *
>
> "The power of the state legislature is an attribute of sovereignty and its power would be absolute if there were no constitutional limitations. * * *" 4 M.J., Constitutional Law, § 31, pp. 114, 115.
>
> "* * * The Constitution is not a grant of power, but only the restriction of powers otherwise practically unlimited and except so far as restrained by the Constitution of this State and the Constitution of the United States, the legislature has plenary power. * * *" Newport News v. Elizabeth City County, 189, Va. 825, 831, 55 S.E.2d 56.

[Almond v. Day *Quoted*]

> "It is an elementary principle of constitutional law that the General Assembly has plenary power except so far as restrained by the Constitution of this State and the Constitution of the United States. It is only where an act is plainly repugnant to some constitutional provision that the courts can declare it null and void. * * *" Almond v. Day, 199 Va. 1, 6, 97 S.E.2d 824.

In the absence of operative provisions of the Virginia Constitution restricting the power of the General Assembly with respect to public schools, the General Assembly is now fully empowered to enact any legislation it may please with respect to such schools provided that legislation is general in nature.

No such limiting provisions have been pointed out, and we have found none.

This unrestricted power enables the General Assembly to provide by general law for the closing of public free schools upon the happening of such events as the General Assembly may provide and for the payment of tuition grants,—provided always grants are available to pupils irrespective of their race. The grants for which the General Assembly has provided in the Acts of 1956 and 1958 are available alike and under identical circumstances to white and colored pupils.

The majority opinion refrained from determining whether the questioned acts violate the Fourteenth Amendment to the Federal Constitution, thus an expression of opinion on that question would be inappropriate in this dissent. Snead, J., joins in this dissent.

EDUCATION
Colleges and Universities—Georgia

Barbara HUNT et al. v. Robert O. ARNOLD et al.

United States District Court, Northern District, Georgia, Atlanta Division, January 9, 1959, Civil Action No. 5781.

SUMMARY: Under a 1953 resolution of the Board of Regents of the University System of Georgia, any applicant for admission to a System institution is required to furnish certificates from at least two Georgia alumni of that institution attesting to his good moral character and reputation and recommending him as one suitable and able to pursue courses offered. [See 1 Race Rel. L. Rep. 968 (1956)]. In 1956, the registrar of the Georgia State College of Business Administration rejected the applications of five Negroes for incompleteness, because the applications were not accompanied by such certificates. Subsequent requests by applicants to the college president for permission to apply without the certificate, and to the Board to make the requirement inoperative as to them because they had no alumni friends or acquaintances, were unsuccessful. Three of the applicants then brought a class action in federal district court against officials of the University System and the College, alleging that the alumni certificate requirement discriminates against otherwise qualified Negroes so as to deny them the due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment, and asking for declaratory and injunctive relief. The court found that since there are no Negro alumni of any white institution of the University System, and since plaintiffs did not know any white alumni, and had only very limited opportunities to become acquainted with any white alumni, the practical effect of the alumni certificate requirement is to prevent Negroes from being able to file a complete application to System institutions, while white students rarely have difficulty securing such certificates. Stating that administrative remedies had been exhausted, the court declared the certificate requirement violated the equal protection clause and enjoined defendants from enforcing it against Negroes and from denying admission to qualified Negroes solely on ground of race or color. The court's opinion and order are reprinted below.

SLOAN, District Judge.

In the complaint, as amended, the plaintiffs, Negroes residing in the City of Atlanta and in the Northern District of Georgia, filed on behalf of themselves and all other Negroes similarly situated and affected who are qualified and desire to receive educational opportunities and advantages at the Georgia State College of Business Administration, Atlanta, Georgia; allege that the regulations and requirements for admission to the Georgia State College of Business Administration are designed to and do discriminate against Negroes and deny them due process of law and equal protection of the laws.

[*Plaintiffs' Contentions*]

It is the contention of the plaintiffs that they are qualified for admission to the Georgia State College of Business Administration but that the defendants do, in accordance with established custom, usage and practice on account of their race and color, deny to plaintiffs and other qualified Negroes similarly situated, the right to attend said Georgia State College of Business Administration while at the same time they accord to white persons the privilege and right to attend said institution.

The plaintiffs contend that the rules of admission and the admission procedure adopted by the Board of Regents of the University System of Georgia governing admission requirements for admission to the Georgia State College of Business Administration, deny to plaintiffs, and other Negroes similarly situated, the right to be admitted to said college and deny to them the equal protection of the laws and due process of law as secured by the Fourteenth Amendment to the Constitution of the United States. The plaintiffs seek declaratory and injunctive relief.

The defendants deny that the rules of admission or admission procedures are unreasonable or discriminatory and aver that they are equally applicable to both white and Negro applicants for admission to the school and

generally deny the allegations of the complaint.

The case came on for trial to the Court, without a jury, on December 8, 1958 and during the days of December 8, 9, 10, 11 and 12 evidence in behalf of the plaintiffs and the defendants was introduced and heard. Additional time in which to present written arguments and briefs was granted and such written arguments and briefs having now been filed, the Court proceeds to a determination of the controversy.

Giving consideration to the evidence, the Court makes the following

FINDINGS OF FACT
PLAINTIFFS

Barbara Hunt

Barbara Beatrice Pace Hunt was born September 5, 1933 and attended the public schools of Beaver Falls, Pennsylvania, a suburb of Pittsburg, graduating from Beaver Falls High School May 29, 1951.

In September 1951, she entered Clark College in Atlanta, Georgia and attended that institution during the 1951-1952 academic year. In September 1952 she was again attending Clark College but voluntarily left Clark College the latter part of September, 1952, and returned to Beaver Falls, Pennsylvania.

On March 4, 1953 Barbara Pace gave birth to a daughter, Alyce Ann Pace, (name later changed to Alyce Ann Hunt).

On October 20, 1953 Barbara Pace and Eldridge Hunt, Jr. filed application for license to marry and on November 7, 1953 they were married in Beaver Falls, Pennsylvania.

On March 19, 1954 a second child was born to Barbara Pace Hunt.

In 1955 Barbara Hunt and her husband separated and she, with her two children, came to Atlanta where she obtained employment as a secretary with the Atlanta office of the Pittsburgh Courier, a national Negro newspaper, remaining there for about two and one-half years. She is now employed at Atlanta University as a secretary in the Registrar's office.

Myra Payne Elliott Dinsmore Holland

Myra Payne Elliott was born in Temple, Carroll County, Georgia on March 20, 1932 and attended grammar school in Temple, Georgia and thereafter attended High School at David T. Howard and Booker T. Washington and later attended Boggs Academy, a private school at Keyesville, Georgia—graduating from that institution and receiving a diploma.

In 1952 she entered Spelman College in Atlanta, Georgia.

On May 1, 1954 Myra Elliott and Adolphus Dinsmore, Jr., obtained license to marry and were married on that date in Atlanta, Georgia.

On August 4, 1954 Adolphus Dinsmore, III, was born to Myra Elliott Dinsmore.

On June 23, 1955 Myra Dinsmore was granted a divorce from Adolphus Dinsmore, Jr.

On October 5, 1956 Myra Dinsmore was married to Robert Holland in Atlanta, Georgia.

On June 7, 1957 Myretta June Holland was born to Myra Elliott Holland.

On April 23, 1958 Joyce Elaine Harland was born to Myra Payne Elliott Harland and Joseph R. Harland. Robert Holland's name was mispronounced "Harland."

While this plaintiff has been employed in various jobs after leaving school, she was, at the time of filing the application for admission to Georgia State College of Business Administration, employed by the Atlanta Life Insurance Company, Auburn Avenue, Atlanta, Georgia.

Iris Mae Welch

This plaintiff was born in Auburn, Alabama but does not know the date of her birth, (see footnote) but from other evidence and her personal appearance, the Court finds the probable date of her birth to be April 30, 1912.

She attended school in Alabama, Tuskegee High School and Alabama State High School, graduating from Alabama State High School in the spring of 1930.

After taking an extension course in a single subject during the term of 1934-1935 at Alabama State College, Miss Welch enrolled for and took a summer course of studies in each of the three years 1935, 1936 and 1942, having been admitted to Alabama State College upon a certificate from Alabama State High School.

In 1943, Miss Welch moved to Columbus, Georgia where she obtained employment with Mr. J. E. Jordan, who operated a photo-shop.

In 1945, Miss Welch moved to Atlanta, Georgia where she has since lived continuously. She has at all times been employed by Mr. J. E. Jordan, an active member of the National Association for the Advancement of Colored People, who, after moving to Atlanta, operated a cut-rate drug store which at the times relevant here was located at 255 Auburn Avenue in the

City of Atlanta, Georgia but is now located at 1305 Jonesboro Road, Atlanta, Georgia. Miss Welch was and is employed in the capacity of bookkeeper-clerk.

NOTE: Miss Welch has given conflicting statements as to the date of her birth, as follows:

April 30, 1912—Voter's registration certificate.

April 30, 1913—Her testimony on this trial.

December 4, 1913—School record, Alabama State College.

April 30, 1920—Her testimony on deposition.

April 30, 1921—Given in her application for admission to Georgia State College of Business Administration.

DEFENDANTS

The defendants in this case are the members of the Board of Regents of the University System of Georgia, the Chancellor of the University System, and the President and the Registrar of the Georgia State College of Business Administration.

The University System of Georgia

The management and government of all of the institutions comprising the University System of Georgia are vested in the Board of Regents. The Board of Regents determines the policies applicable to all the schools and colleges in the system.

The University System of Georgia is composed of some 16 institutions, divided into three general groups, as follows:

Senior Institutions—White Students

Athens—University of Georgia
Atlanta—Georgia Institute of Technology
Atlanta—Georgia State College of Business Administration
Augusta—Medical College of Georgia
Dahlonega—North Georgia College
Milledgeville—Georgia State College for Women
Statesboro—Georgia Teachers College
Valdosta—Valdosta State College

Senior Institutions—Negro Students

Albany—Albany State College
Fort Valley—Fort Valley State College
Savannah—State College

Junior Institutions—White Students

Americus—Georgia Southwestern College
Carrollton—West Georgia College
Cochran—Middle Georgia College
Douglas—South Georgia College
Tifton—Abraham Baldwin Agricultural College.

When a Negro files an application for admission to an institution maintained for white students, it has been the practice to send those applications to Mr. Siebert, the Secretary of the Board of Regents, and let Mr. Siebert offer them the opportunity to ask for out-of-state aid.

It has been and is the policy of the Board of Regents to assist Negro students to secure in institutions, outside the University System, graduate and professional work that is offered in the University System institutions for white students, but which is not offered at any one of the three institutions for Negro students. During 1956-1957, 2,105 students received 2,715 scholarship aid grants for graduate and professional work at 79 institutions.

The Georgia State College of Business Administration

The Georgia State College of Business Administration was started about 1914 as The Evening School of Commerce of Georgia Tech, and operated under that name until about 1934 when it was separated from Georgia Tech, and was then operated under the name "University System Center" as an independent institution in the University System until 1946, when its name was changed to "Atlanta Division University of Georgia." It operated under this name until 1955 when it became a four year college offering in addition to degrees in Business Administration, courses leading to degrees in the liberal arts field, including the field of education. Degrees of Bachelor of Arts, Bachelor of Science, Bachelor of Business Administration and Master of Business Administration may be awarded at this institution.

The school may be attended by students as full time day students or as evening students.

For the 1956-1957 term there were in excess of 5,600 students enrolled there, some 2200 for day time classes, and some 3400 for evening classes.

Alumni of the institution, under any name that it has borne, are considered and accepted as alumni of the Georgia State College of Business Administration.

No Negroes have ever been enrolled at the Georgia State College of Business Administration and there are no Negro alumni of that institution. No Negroes had applied for admission to the institution prior to March, 1956.

ADMISSION REQUIREMENTS AND PROCEDURE AT THE GEORGIA STATE COLLEGE OF BUSINESS ADMINISTRATION

On April 8, 1953, the Board of Regents of the University System of Georgia adopted a resolution amending the requirements for admission to the various institutions of the University System of Georgia so as to provide that additional requirements must be met. The relevant portion of the resolution is substantially as follows:

Any resident of Georgia applying for admission to an institution of the University System in addition to meeting other requirements shall submit certificates from two citizens of Georgia, alumni of the institution he desires to attend, which shall certify that each of such alumni is personally acquainted with the applicant and the extent of such acquaintance; that the applicant is of good moral character, bears a good reputation in the community in which he resides, and in the opinion of such alumnus is a fit and suitable person for admission to the institution and able to pursue successfully the courses of study offered by the institution he desires to attend.

In addition the applicant shall also submit a certificate from the Ordinary or Clerk of the Superior Court of the county in which he resides that such applicant is a bona fide resident of the county, is of good moral character, and bears a good reputation in the community in which he resides.

On May 9, 1956, the regulation was further amended by providing that any applicant who lived in a county having a population of 100,000 or more might submit, in lieu of the certificate from the Ordinary or Clerk of the Superior Court, a certificate from a third alumnus of the institution that the applicant desired to attend. The amendment required that the third alumnus be one of those on a list of alumni designated by the President of the Alumni Association of the Institution to assist the institution in its efforts to select students of character and aptitude and ability and to obtain corroborative evidence regarding the place of residence of such students. The certificate of the third alumnus in counties with a population of 100,000 or more was required to set forth the same facts as were required of the certificate from the Ordinary or Clerk of the Superior Court.

By an amendment adopted March 12, 1958, standards for the guidance of alumni, ordinaries and clerks of the superior court called upon or requested to execute certificates on behalf of applicants were adopted and set forth.

[*Test Required*]

The admission requirements as amended by the resolution of April 8, 1953, and as thereafter amended, reserved to every institution of the University System the right to require any applicant to take appropriate intelligence and aptitude tests in order that the institution might have information bearing on the applicant's ability to pursue successfully courses of study for which the applicant wished to enroll and reserved the right to reject any applicant who failed to satisfactorily meet such tests. The resolution also reserved to every institution the right to determine the sufficiency of any certificate required by the regulation and the right to reject the application of any person who had not been a bona fide resident of Georgia for more than twelve months.

The bulletin of Georgia State College of Business Administration for the year 1955-1956, at page 6, provided as follows:

> "Students entering for the first time should provide the Registrar in advance with a complete record of work done in other institutions including the secondary schools. The registration of an applicant who has not furnished the Registrar with the proper credentials is on a tentative basis. His registration is subject to cancellation should his transcript when received show him to be ineligible for admission."

On November 8, 1950, the Board of Regents of the University of Georgia adopted a resolution regulating the procedure whereby applicants for admission to institutions of the University System who had been denied admission and students who had been expelled or against whom disciplinary action had been taken might appeal from the decision of the admitting or disciplinary authorities. The resolution provided in substance that any dissatisfied applicant or student could appeal from the decision of the initial authority to the President of

the institution he attended or to which he applied for admission, and that the President of such institution should appoint a faculty committee to investigate the matter and should act after consideration of the report of such committee. If the student or applicant was dissatisfied with the action taken by the President of the institution, he was authorized to appeal to the Chancellor of the University System, who is the chief executive officer of the Board of Regents. If dissatisfied with the decision of the Chancellor, such appellant could appeal to the Board of Regents for final decision.

APPLICATION FOR ADMISSION TO GEORGIA STATE COLLEGE OF BUSINESS ADMINISTRATION BY NEGROES OTHER THAN PLAINTIFFS

In March of 1956 six Negroes, including one of the plaintiffs here, Myra Dinsmore, sought to apply for admission to the Georgia State College of Business Administration. These applicants mailed their applications together with their checks to cover the costs of their "course" or "community program" which they desired to participate in. The Registrar returned to each of these applicants their check or money order stating that the same had been furnished with applicants' "incomplete" application.

Two of the applicants furnished transcripts of their previous college work, but neither furnished the required certificates as to character or ability. However, it does not appear that either of the applicants were lacking in qualifications as to character or academic credits.

The application forms used by these applicants were forms that had been used while this institution had been a Division of the University of Georgia, during which time alumni of the University of Georgia were allowed to sign the certificates for applicants, but were used by these applicants after the adoption of the resolution requiring a certificate from alumni of the institution they desired to attend and after the institution had ceased to be a division of the University of Georgia and had become an entirely separate institution, the Georgia State College of Business Administration.

PLAINTIFFS' APPLICATIONS FOR ADMISSION TO GEORGIA STATE COLLEGE OF BUSINESS ADMINISTRATION

Prior to and in June of 1956 Miss Marian McDaniel was office secretary of the National Association for the Advancement of Colored People and the only person regularly present at the office of that organization which was located on Auburn Avenue in the City of Atlanta. Miss McDaniel has since married and is now Mrs. Marian McDaniel Moore.

The three plaintiffs, with Russell T. Roberts, a former plaintiff to this action, were known to Miss McDaniel and they frequently lunched together on Auburn Avenue. The making of applications for admission to the Georgia State College of Business Administration was a subject of discussion at the luncheon table and it was decided that such applications would be made by Miss McDaniel, Russell T. Roberts and each of plaintiffs.

At the luncheon table the composing and printing of a letter to alumni of the Georgia State College of Business Administration was discussed and the contents of the letter agreed upon. The letter was stenciled and mimeographed, the envelopes addressed and the letter prepared for mailing in the office of the National Association for the Advancement of Colored People and by its secretary.

These letters bore the date of June 11, 1956 and were addressed to alumni of the institution, none of whom were known to plaintiffs, asking if such alumnus would be willing to certify to the character, reputation, fitness, etc., for admission of any one of the signers, and if they were so willing, requesting an appointment, and the letters were signed by each of the plaintiffs. The letters were mailed by some of the signers but no reply was received by any signer.

[*Applications Filed*]

On June 14, 1956 the three plaintiffs and Russell T. Roberts and Marian McDaniel, the Secretary of the National Association for the Advancement of Colored People, each filled out an application form for admission to the Georgia State College of Business Administration. Neither the alumni certificates nor the certificate of the Ordinary or Clerk of the Superior Court were furnished. The applications were not accompanied by the transcript of the previous high school or college records of plaintiffs. On that date (June 14, 1956) they, with two Negro ministers, a newspaper reporter and photographer, proceeded to the office of the Registrar of the Georgia State College of Business Administration. The Registrar orally re-

jected the applications as incomplete. While at the college, plaintiffs sought to secure the required certificate from a number of alumni of the school who were there present, but plaintiffs and such alumni were unknown to each other, and it was on this ground that such alumni refused to sign a certificate.

The plaintiffs made no effort to secure the certificate from the Ordinary or Clerk of the Superior Court of Fulton County. Plaintiffs relied upon the fact that the Ordinary of Fulton County had in March, 1956, advised the attorney for other Negro applicants, by letter, that it was, at that time, the practice of the officials of the college to send applications to him for certification in batches after the applications had been processed and approved by the school.

Plaintiffs Actions After the Applications had Been Rejected as Incomplete

The plaintiffs on June 15, 1956 employed counsel to represent them in determining their rights to be admitted and to attend this institution.

On June 15, 1956 the plaintiffs returned to the Registrar's office and had him to enter on their applications the word "incomplete."

After the Registrar stamped the applications of plaintiffs "incomplete," plaintiffs' attorney on the 15th day of June, 1956, wrote a letter to the President of the College. In this letter the plaintiffs requested that they be allowed to file their applications upon complying with the other regulations, on the grounds that the plaintiffs had no friends or acquaintances among the alumni and were not personally known to any member of the alumni of the institution. The President on June 22, 1956 replied that he had turned the letter over to the Attorney General of the State of Georgia because "it had implications of legal procedure." The President further advised that he had no recourse but to follow the regulations as adopted by the Board of Regents.

On July 5, 1956 the attorney for plaintiffs wrote to the Board of Regents and requested that the requirements as to certification by alumni be made inoperative and inapplicable to plaintiffs as plaintiffs were not personally known to any alumnus of the institution and that plaintiffs be admitted upon complying with all valid regulations and requirements. On July 12, 1956 the Chancellor replied, stating that the letter of plaintiffs' counsel had been presented to the Board of Regents at its regular meeting, was carefully considered, and for the reasons stated in the letter, the request was refused. Plaintiffs each visited the President of the National Association for the Advancement of Colored People and asked financial assistance in defraying expenses of this litigation. This request was granted and the National Association for the Advancement of Colored People is defraying the expenses of this litigation.

Plaintiffs Qualifications for Admission

Plaintiffs have each completed high school and in addition have had some college work and, while their scholastic qualifications would be subject to review under valid admission requirements of the Georgia State College of Business Administration, the Court finds, under the evidence here, that the plaintiffs have scholastic credits sufficient to qualify them to make application for admission to the college.

While the evidence indicates that the plaintiffs, Barbara Hunt and Myra Elliott Dinsmore Holland, may not be of good moral character and for that reason may not be qualified for admission to the college, the evidence shows the other plaintiff, Iris Mae Welch, to be of good character and not lacking in qualification for admission.

Judicial Notice

The Court takes judicial notice of the fact that it is not customary for Negroes and whites to mix socially or to attend the same public or private educational institutions in the State of Georgia, and that by reason of this presently existing social pattern, the opportunities for the average Negro to become personally acquainted with the average white person, and particularly with the alumni of a white educational institution, are necessarily limited.

The Alumni Certificate Requirement

The effect of the alumni certificate requirement upon Negroes has been, is, and will be, to prevent Negroes from meeting this admission requirement. As a result Negro applications have been rejected and would hereafter be subject to be rejected as incomplete without being considered on their merits.

Plaintiffs did not and do not know any of the alumni of the Georgia State College of Business Administration.

White students, rarely, have difficulty in securing the alumni certificates.

STIPULATION

The parties have stipulated that there are no Negro alumni of the Georgia State College of Business Administration or of any other white institutions in the University System.

CONCLUSIONS OF LAW

This being an action for declaratory judgment and equitable relief to protect civil rights, this Court has jurisdiction of the controversy by virtue of the provisions of §§ 1331 and 1343 of Title 28 and §§ 1981 et seq. of Title 42 of the United States Code.

This is a class action. The class is formed solely by the presence of the common question of law or fact. The right or liability of each member of the class is distinct. It is as individuals that plaintiffs are entitled to equal protection of the laws. Brown v. Board of Trustees of La Grange Ind. Sch. Dist., 5 Cir., 187 F.2d 20; Moore's Federal Practice, 2nd Edition, Vol. 3, ¶ 23.11; Cf. National Ass'n for Advance of Colored People v. Patty, 159 F.Supp. 503(21).

The class here is composed of:

Negroes who are qualified to meet all valid requirements for admission to the Georgia State College of Business Administration and who are therefore eligible for admission to that institution. The plaintiffs must be members of the class that they purportedly represent. Hansberry v. Lee, 311 U.S. 32; Clark v. Chase Nat. Bank of City of New York, 45 F.Supp. 820; Moore's Federal Practice, 2nd Edition, Vol. 3, ¶ 23.04, p. 3419.

Plaintiffs would be entitled to declaratory or injunctive relief if it is shown that they, or one of them, have been injured or deprived of personal and present rights to admission to the Georgia State College of Business Administration. McCabe v. Atchison, T. & S. F. R. Co., 235 U.S. 151.

This Court is bound by the decisions of the Supreme Court of the United States, and for this Court to express disagreement with such decisions would not only be futile but improper.

[*Rights Violated*]

The policy, custom, practice and usage of the defendants in maintaining and operating the Georgia State College of Business Administration on a racially segregated basis is violative of the rights secured to plaintiffs, and of rights secured to other Negro students of Georgia, who are similarly situated, by the due process and equal protection clauses to the Fourteenth Amendment to the Constitution of the United States. Brown v. Board of Education, 347 U.S. 483, s.c. 349 U.S. 294.

The scholarship program which aids Negro students to take graduate and professional work offered at white institutions of the University System of Georgia and at other institutions which accept Negroes, either outside the State or at private Negro institutions within the State, does not meet the requirement of equal protection. Missouri ex rel. Gaines v. Canada, 305 U.S. 337.

The alumni certificate requirement is invalid as applied to Negroes because there are no Negro alumni of any of the white institutions of the University System of Georgia, and consequently this requirement operates to make it difficult, if not impossible, for Negroes to comply with the requirement, whereas white applicants do not face similar difficulties. The requirement, therefore, violates the equal protection clause to the Fourteenth Amendment to the Constitution of the United States.

[*Plaintiffs' Motives Insignificant*]

That the motive for the plaintiffs in making application for admission to the Georgia State College of Business Administration was the filing of this suit is not significant. Doremus v. Board of Education, 342 U.S. 429, 434-435; Evers v. Dwyer, United States Supreme Court, No 382, October Term, 1958, decided December 15, 1958.

Plaintiffs actions with reference to appeal met the requirements, if any, as to exhausting administrative remedies. City of Charlottsville, Va. v. Allen, 4 Cir., 240 F.2d 59, 63, 64; Gibson v. Board of Public Instruction of Dade County, 5 Cir., 246 F.2d 913(3), 914; Bush v. Orleans Parish School Board, 138 F.Supp. 337, 339, aff. 5 Cir., 242 F.2d 156.

Plaintiffs and members of the class which they, or one of them represent, are entitled to an injunction enjoining the defendants from continuing to limit the Georgia State College of Business Administration to white students only, and enjoining defendants from requiring Negro applicants to the institution to furnish certificates as to their personal qualities which may be certified to only by alumni of the white institutions.

A judgment and decree in conformity with the

findings here made and the conclusions here entered may be prepared and presented.

[*College Administration's Rights*]

In formulating the decree, it is to be kept in mind that the authorities in control of the operation of the Georgia State College of Business Administration have the primary right and responsibility of fixing and passing upon the qualifications for admission.

The decree will only restrict the exercise of this right to prohibit denying admission to qualified Negroes solely because of their race and color, and to prohibit the adoption of admission requirements that will deny to them the equal protection of the laws and due process of law.

This the 9th day of January, 1959.

ORDER

The above stated case having been tried to the Court without a jury and the Court having made findings of fact and conclusions of law, which have been filed herein, now, in conformity therewith, it is

ORDERED That the defendants Robert O. Arnold, James D. Gould, Allen Woodall, Linton Baggs, Everett Williams, John I. Spooner, Howard Calloway, David Rice, C. L. Moss, Morris Bryan, Mrs. William T. Healey, Freeman Strickland, Quimby Melton, Jr. and Carey Williams as members of the Board of Regents of the University System of Georgia and Noah Langdale, Jr. as President of the Georgia State College of Business Administration, John D. Blair, as Registrar and Director of Admissions of the Georgia State College of Business Administration, and Harmon W. Caldwell, as Chancellor of the University System of Georgia, their agents, employees, successors and all persons in active concert and participation with them, be and they are hereby forever enjoined and restrained from:

(1) Requiring Negro applicants for admission to the Georgia State College of Businss Administration to furnish certificates as to their personal character and abilities which may be certified to only by alumni of white institutions;

(2) Refusing admission to the Georgia State College of Business Administration to negroes who are qualified for admission solely on the ground of race or color.

This Court recognizes that the primary right and duty of fixing admission requirements and passing upon the qualifications of applicants for admission to the Georgia State College of Business Administration rests upon those in authority at that institution and nothing in this order shall be construed to restrict the proper exercise of that right. The intent of the injunction herein granted is to only restrict the exercise of that right to forbid admission requirements which will deny to Negroes equal protection or due process of law and to forbid denial of admission to Negroes, who are qualified for such admission, solely on the ground of their race or color.

It is further ordered that defendants pay the costs herein.

This the 14th day of January, 1959.

EDUCATION
School Buildings—Mississippi

Following allegations by the Mississippi field secretary for the National Association for the Advancement of Colored People that a new Negro high school building in Madison County, Mississippi, had been erected under a "frantic make-shift school program" and was "ill-equipped and overtaxed," a grand jury of that county conducted an investigation of the matter. The jury found that no complaints had been made by local citizens, termed the individual making the charges "irresponsible," and reported that "the largest school for negroes in the state, is a magnificent physical plant and is being run in an efficient manner."

To: HONORABLE LEON F. HENDRICK,
CIRCUIT JUDGE:

In response to the thought provoking charge of Your Honor, we have sat as the Grand Jury of Madison County, Mississippi, for two days during the first week of the current Term.

We have conducted 8 investigations, have examined 15 witnesses and have returned 7 True

Bills. A list of those witnesses appearing before the Grand Jury, certified to by the Foreman, is attached to this Report.

We have been available on each of the above mentioned days for anyone who desired to appear before us.

This Grand Jury has been concerned over statements made by one Medgar Evers with regards to the Rogers Junior-Senior High School located in Madison County. With the belief of the average citizen that Madison County was making an honest attempt to afford its colored citizens more than adequate opportunity under the time tested theory of separate but equal facilities, this charge by Evers came as a bolt from the blue. If his charges had foundation, then the time, money and energy of this county had been wasted. We felt compelled to investigate this matter fully. As a body, we have adjourned to the school in question and have made a thorough inspection of its physical plant. We have talked to the Superintendent of Schools for Canton Separate School District, Mr. D. M. Allen, and received certain data by way of testimony.

[*NAACP Secretary's Charges*]

Medgar Evers stated, and was quoted in the Presses, that the erection of the Rogers Junior-Senior High School was a "frantic makeshift school program" and that this new negro school was "illequipped and overtaxed".

Our investigation reflects the true facts to be the following:

The Rogers Junior-Senior High School was built at a cost of $447,144.00 to the State of Mississippi. In addition thereto, the Canton Separate School District contributed the sum of approximately $13,000.00 for the construction of a football field and other improvements not provided for in the State grant. The City of Canton contributed the lights for the football field.

This school has 64,000 square feet of floor space, has 32 classrooms, employs 38 teachers, has 2 vocational training shops, an auditorium with a seating capacity of 2,000, 2 libraries, 2 rooms for the instruction of Home Economics, 3 Science laboratories and kitchen and cafeteria facilities for serving 1,200 students.

Our inspection of the premises reveals that this school building reflects nothing but credit upon Madison County. The classrooms have all new fixtures and equipment, and are being kept scrupulously clean. We found no classrooms that were crowded, or "overtaxed". In fact, we would estimate that the average classroom in the High School section could easily handle 25% more students than the average daily attendance.

We found the equipment in the two shops to contain possibly the best equipment of its kind in Madison County. We found the plumbing facilities modern in every respect. We found the cafeteria and the Home Economics rooms to be ultra-modern.

[*Grand Jury's Conclusions*]

In short, our inspection of the Rogers School leads us to the conclusion that this, the largest school for negroes in the State, is a magnificant physical plant and is being run in an efficient manner by those in charge. No member of this Grand Jury received secondary education in a finer school facility.

In order to be entirely fair in our investigation, we have attempted to ascertain whether the Evers outburst came as a result of local complaints. We are of the opinion that there were no complaints from citizens of this county. As further proof, we would refer those interested to Volume 66, Number 44, issue of October 30, 1958 of the Madison County Herald. Page 7 of said issue is a full page ad wherein the members of the faculty and staff of the Rogers School expressed their pride in, and appreciation for their new school. Also, on April 4, 1957, such responsible negro citizens of Madison County as A. M. Rogers, supervising principal of negro schools in Canton; the Rev. P. F. Parker, Pastor of the Mt. Zion Baptist Church; R. M. Mackey, Negro County Agent; F. D. Parrish, Negro Home Demonstration Agent; and C. M. Varnado, President of the Negro Chamber of Commerce, wrote the Superintendent of Education of the Canton Separate School District expressing their approval of the plans for the new Rogers School.

Based on the testimony heard and upon our own personal inspection, we are inevitably led to the conclusion, that, in his criticism of the schools of Madison County, Medgar Evers was extremely careless with the truth, if not a total stranger thereto.

[*Statements About Secretary*]

After our discovery of the absolute dearth of truth in Evers statement, we inquired of our District Attorney as to information concerning

this man. The District Attorney produced for our inspection the sworn statement of Medgar Evers given before the Grand Jury of the First Judicial District of Hinds County, Mississippi. This statement shows that Medgar Evers is a negro and a native of Decatur, Mississippi. He now holds the office of Field Secretary of the State of Mississippi for the National Association for the Advancement of Colored People and is paid an annual salary of $5,000.00. His immediate superior is Ruby Hurley of Atlanta, Georgia. Evers' salary is paid from the National office of his organization. Evers statement further informed that a membership card in the NAACP costs $2.00 but a life membership can be purchased for $500.00. The state president of the organization is C. R. Darten of Meridian and the State secretary is Mary Cox of Jackson. Evers' office is located at 1072 West Lynch Street in Jackson, Mississippi.

Thus, we measure the man who has howled from afar, like a hound baying the moon, about conditions of the public schools of Madison County. His cries attain no higher stature than those of the most irresponsible child. He has, in public print likened himself and his organization to the Mau Mau terrorists movement of Kenya Colony. On this point, we find no cause to take issue with him. We only hope that the responsible colored people of Madison County think twice before they throw away their money by contributing to an organization that is nothing more than a leech on the side of the Body Politic. We would caution both the white and colored people of Madison County that the good relations enjoyed between the races here was not built overnight but rather is a product of the labor of several generations. To allow the irresponsible spokesman of such an organization as the NAACP to disrupt the peaceful relations between the races in this county, or in this State, would not only be tragic but foolhardy.

And now, having rendered this report, the Grand Jury prays that they be discharged subject to the call of the Court during the present Term.

This the 7th day of January, 1959.

For and on behalf of the Grand Jury.

J. K. Simpson
Foreman

EDUCATION
School Bombing—Tennessee

Edward CLINE v. STATE of Tennessee.

Supreme Court of Tennessee, December 12, 1958, 319 S.W.2d 227.

SUMMARY: Three men were indicted for conspiring to dynamite a Clinton, Tennessee, high school. After dismissal of one defendant's case on the state's motion to enter a *nolle prosequi*, a trial resulted in verdicts of not guilty for one and guilty for the other of the defendants. On appeal, the convicted defendant assigned as error a lack of evidence of an overt act by him in furtherance of the alleged conspiracy, as required by Tennessee statute, and the impossibility of the offense of conspiracy being committed by a single party. The Tennessee Supreme Court found sufficient evidence of an overt act by the convicted defendant in testimony that he had spoken of an offer of $1000 to him to blow up the building, that he had loaded dynamite in his car and transferred it to his home, and that he had been found in unexplained possession of a large quantity of dynamite. Adopting the rule that "so long as the acquittal or death of co-conspirators does not remove the basis for a charge of conspiracy, a single defendant can be prosecuted and convicted of the offense," the court affirmed the conviction because the defendant to whom the *nolle prosequi* had been entered had not been acquitted.

NEIL, Chief Justice.

This is an appeal from a conviction of a conspiracy to dynamite and destroy the Clinton High School at Clinton, Tennessee, the punishment fixed by the jury being from two to ten years in the State penitentiary.

[*Indictment*]

The indictment charges that on or about October 13, 1957, Clifford Lowe, Avon Nolan and Edward Cline did "unlawfully, intentionally, willfully, and feloniously enter into an agreement to commit an illegal act or acts capable of producing conditions destructive of life or property by the possession or transportation or use of explosives, dynamite, and for the illegal purpose of destroying the Clinton High School by an explosion or explosions of an illegal nature in violation of Code Section 39-1407 of the Tennessee Code Annotated".

The aforesaid indictment was returned on January 29, 1958, in the Criminal Court of Anderson County. The defendants and each of them entered a plea of not guilty. The District Attorney General, however, by permission of the court, entered a nolle prosequi as to the defendant Nolan, and that "he go hence and for nothing held." Thereupon the defendants, Clifford Lowe and Edward Cline, were put to trial upon the indictment which resulted in a verdict of not guilty as to Lowe and a verdict of guilty as to Cline with his punishment fixed as above stated.

The defendant was ably represented by counsel, who has filed the following assignments of error with a supporting brief:

(1) "The court erred in allowing the conviction to stand because there was no evidence to sustain the conviction."

(2) "The court erred in refusing to grant a new trial because the state entered a nolle prosse as to Avon Nolan and the jury acquitted Clifford Lowe of the crime of conspiracy and it is impossible to be guilty of a conspiracy."

[*Bill of Exceptions*]

The bill of exceptions is in narrative form, which was approved by the trial judge and the District Attorney General. The defendant's counsel state at the outset, "The defendant, Edward Cline, had no funds with which to properly defend himself and the evidence was not transcribed by a court reporter." We accept this as true since it is not controverted by opposing counsel. But we are fully satisfied that the record contains an adequate bill of exceptions. Moreover, there is no contention made by the counsel that it is inadequate. It is our well considered opinion that when the trial judge certifies a record to this Court which contains a narrative of the evidence we will hold the same to be adequate to protect all legal rights of a defendant unless the record affirmatively shows that the trial judge abused his authority, or was grossly negligent, in so certifying the record.

Considering the evidence in support of the State's case against Cline, it appears without dispute that during the month of September 1957, which was prior to the indictment, the defendants were seen in Clinton associating together on different occasions.

The defendant Nolan, whose case was dismissed on motion of the State to enter a nolle prosequi, testified as a witness for the State. We will later on state the substance of his testimony.

[*Sheriff's Testimony*]

Sheriff Glad Woodward testified to the following facts:

"* * * that on or about the middle of September, 1957, a man by the name of Tom Powell of Anderson County, Tennessee, reported to him that there was some dynamite located near the Clinch River Bridge. The witness further testified that he went to the place and found burlap sack partially filled with dynamite, approximately 156 sticks were in the sack, and that said dynamite was Red Cross Dynamite. The witness further testified that in conducting his investigation he contacted Edward Cline, Avon Nolan and Clifford Lowe. The witness further testified that Edward Cline and Clifford Lowe denied having any knowledge of the dynamite. Witness further testified that while Avon Nolan was in jail he admitted that he, Edward Cline and Clifford Lowe went to Block House Valley Road, brought the dynamite from Block House Valley Road and placed it under the bridge and that Edward Cline had told him that a man had offered him One Thousand Dollars ($1,000.00) to blow up the Clinton High School. The witness further testified that Avon Nolan told him where there was some other dynamite hidden near the bridge and that in October he went to the place where Avon Nolan said the dynamite was hidden and found more dynamite, approximately 156 sticks.

"The witness further testified that while Cline was in jail with Nolan he had Eugene Enix brought to the jail and he talked to Enix in the presence of Cline on October

13, 1957, and Enix stated that Cline came to Kentucky in an effort to get a job and ask him where he could get some dynamite caps; Cline told him that he had some dynamite stored near the Clinch River Bridge in Clinton, Tennessee, and that he had been offered One Thousand Dollars ($1,000.00) to blow up the Clinton High School. Witness further testified that said dynamite was found in Anderson County, Tennessee. It was stipulated that 312 sticks of dynamite was found by sheriff's office but need not be introduced as an exhibit."

On cross examination Sheriff Woodward testified, as follows:

"• • • that he had never seen Cline, Lowe and Nolan together at any time; that he did not see them with any dynamite in their possession; that he did not see them in or near the Clinch River Bridge and that all he knew about the case was what he had been told by Avon Nolan, one of the defendants that was charged under the indictment, and the statements made by Eugene Enix about the conversation between he and Edward Cline."

[*Nolan Testimony*]

The testimony of Avon Nolan is as follows:

"Avon Nolan testified that he had known Edward Cline and Clifford Lowe for about one year and that he had known Edward Cline about one year and one-half. The witness further testified that he lives in Pop Hollow, Anderson County, Tennessee, and at the time of this hearing he was in the County Jail at Clinton, Tennessee. He further testified that he, Edward Cline and Clifford Lowe got together at Cline's house; that there was no one else at home; that Cline told he and Lowe that he had some dynamite stored under the bridge and that he wanted them to help him blow up the school house; that this meeting was in the day time and that later that night they went in Cline's car, he Cline and Lowe, and they went two or three miles from Cline's house to Block House Valley Road; that they parked on the left hand side of the road and got two cases of dynamite and fuse and put them in the car; that the dynamite was wrapped in card board boxes; that they had no further discussion, but they brought the dynamite back to Cline's house. This was around the middle of September.

"The witness further testified that he and Clifford Lowe stayed in the car, that they never did set any particular date to blow up the school house; that Clifford Lowe agreed to help Cline, but that he (Nolan) did not tell Cline he would help.

"The witness further testified that about three (3) days after they brought the dynamite from Block House Valley Road and placed in Cline's home, they took the dynamite to a bridge and that he set one sack of the dynamite on the left side of the road and Clifford Lowe set the other sack of dynamite on the right side of the road.

"The witness further states that he was arrested about three weeks from this time.

"The witness further testified that he gave the sheriff information as to the place where the dynamite was stored."

On cross examination he testified "that he turned State's evidence because he wanted to do so and that he had not been promised a reward or leniency for doing so." He admitted that he along with Clifford Lowe broke into Lindseys Store.

[*Other Testimony*]

The next State's witness, one Eugene Enix, testified to the following:

"• • • that he was living in the State of Kentucky in September 1957; that he knew Edward Cline and Clifford Lowe; that Cline came to his home in Kentucky and that Cline stayed with him about a month; that Edward Cline came to Arnold, Kentucky about September 9, 1957 in an effort to get a job; that Cline came from Kentucky back to Jacksboro, Tennessee, and was placed in jail, but while Cline was in Kentucky he ask him (Enix) if he knew where a man could pick up eight or ten dynamite caps, that he had been offered some money to blow up Clinton High School. That he had some boys to help him, and the dynamite was hid under Clinton Bridge.

"The witness further testified that he was in Clinton, Tennessee, with Cline in October 1957, that Cline was in jail and he was brought to the jail and he told Sheriff Glad Woodward in the presence of Cline

that Cline wanted to know where he could get eight or ten dynamite caps and he further told the sheriff in the presence of Cline that Cline told him that he had some dynamite hidden and that he had been offered money to blow up the Clinton High School."

One Lester Nation testified that he lived in Cline's home for a year and that at no time did Cline, Clifford Lowe and Avon Nolan bring any dynamite to Cline's home; that Cline, Lowe and Nolan were at his home on several occasions and came and went in Cline's car.

[*Codefendant's Testimony*]

The defendant Cline did not testify. His co-defendant, Clifford Lowe, testified he was well acquainted with Avon Nolan and Edward Cline. We was positive that he had never talked to Cline and Nolan about blowing up the Clinton High School; that he had no knowledge of any dynamite being stored near the Clinch River Bridge and did not bring any dynamite to Cline's home. Further testifying he said:

> "Defendant further testified that no one had offered him money to destroy the Clinton High School and that he had no knowledge of an offer to Cline or Avon Nolan to blow up the Clinton High School."

We have thus quoted at length the testimony of all witnesses who knew anything about the case exactly as the same appears in the bill of exceptions.

The jury accredited the testimony of Sheriff Woodward, Avon Nolan and the witness Enix.

We think the evidence supports the charge of a conspiracy even though Lowe was acquited by the jury, and Nolan was permitted his freedom from prosecution by reason of a nolle prosequi. It is earnestly and ably argued by defendant's counsel that Edward Cline's conviction cannot stand because of the foregoing facts, i.e. the acquittal of his alleged co-conspirator, Lowe, and the lack of any evidence showing any overt act on his part in furtherance of the conspiracy.

[*Insufficient Evidence Charged*]

In further support of the first assignment of error that there is no evidence to sustain the conviction it is argued that Avon Nolan "testified that he did not ever agree to help destroy Clinton High School with explosives" and that in order to prove a criminal conspiracy there must be a combination of two or more persons to do that which is contrary to law, citing Delaney v. State, 164 Tenn. 432, 51 S.W.2d 485, 487. It is further argued, "when only two are charged with a conspiracy, and one is acquitted, the conviction of the other is void."

We think the fallacy in the foregoing contention is that *three persons*, including the defendant Cline, were on trial. Only one was acquitted, to-wit, Clifford Lowe. Avon Nolan, who was charged with being one of the conspirators was not acquitted as heretofore pointed out. We thus distinguish the Delaney case from the case at bar.

It must be conceded that under the authority of Delaney v. State, supra, that had the jury acquitted both Nolan and Lowe the case against Cline as a joint conspirator would wholly fail. 12 C.J., pp. 616, 617, "Conspiracy", Sections 190 and 191; 15 C.J.S. Conspiracy § 82.

The test of Cline's guilt depends upon the effect of the nolle prosequi taken by the State as to Avon Nolan. The proper rule applicable to the case at bar is thus stated:

> "* * * The proper rule seems to be that so long as the acquittal or death of co-conspirators does not remove the basis for a charge of conspiracy, a single defendant may be prosecuted and convicted of the offense. * * * Moreover, where two conspirators are indicted jointly, the death of one does not relieve the other of conviction, if the conspiracy between him and the decedent is established. One of three persons who are indicted for conspiracy may likewise be convicted notwithstanding the death of the second and the acquittal of the third. Upon the same principle, one of two conspirators may be convicted, although his co-conspirator has secured immunity from prosecution by becoming a witness for the prosecution. Likewise, one of two defendants indicted for conspiring with other unknown persons may be convicted notwithstanding the acquittal of the other." 11 Am.Jur., Sec. 26, "Conspiracy", pp. 560 and 561.

See also annotations in 72 A.L.R. 1180, and 97 A.L.R. 1312, which support the text.

We deem it unnecessary to define a criminal conspiracy at common law. Indeed it is difficult to define as adequate to every situation. The authorities, however, are generally in accord that, "A conspiracy once formed, continues to

exist until consummated, abandoned, or otherwise terminated by some affirmative act." 15 C.J.S. Conspiracy § 35, p. 1057.

While mere knowledge by one alleged conspirator that an unlawful act has been agreed upon, and without participation does not make one a conspirator, yet, "If there is concert of design there need not be participation in every detail of its execution, or knowledge of the scope of the conspiracy." 15 C.J.S. Conspiracy § 40, p. 1062.

[*Proof of Overt Act*]

Contention is made that there is no proof of any overt act by the defendant Cline, and in the absence thereof no crime has been committed.

> "At common law no overt act is necessary to constitute a criminal conspiracy, and this rule obtains unless changed or limited by statute. The only significance of acts done in furtherance of the object of a conspiracy is as evidence of the alleged combination, which alone constitutes the offense." 15 C.J.S. Conspiracy § 43, p. 1066.

The foregoing common law rule is modified by Section 39-1102, T.C.A., as follows:

> "No agreement shall be deemed a conspiracy unless some act be done to effect the object thereof, except an agreement to commit a felony on the person of another, or to commit the crimes of arson or burglary."

[*Statute Construed*]

We think a proper construction of the foregoing Section of the Code when applied to the case at bar requires some evidence of an overt act to sustain the charge of a criminal conspiracy to destroy the Clinton High School by the use of dynamite or other similar explosives. We think that the evidence when considered as a whole sustains the charge, and that the essential element of an overt act by Avon Nolan and the defendant Cline is sufficiently shown.

There are cases almost without number dealing with the question of "overt acts" and what constitutes an "overt act" when such an act is an essential element in a particular crime. A number of cases are cited in 30 Words and Phrases, Overt Act, p. 580, from which we quote:

> "An 'overt act' must be something more than evidence of the conspiracy. It must be an act done by one of the parties to carry out the intent, and it must be such as would naturally effect that result; at least, it must be a step towards the execution of the conspiracy. Williams v. State, 16 Okl.Cr. 217, 182 P. 718, 723.
>
> "An 'overt act' is some act done to effect the object of the conspiracy. Gist of conspiracy is agreement to effect unlawful end, but, before offense is completed, party to conspiracy must do some 'overt act' (Cr. Code §37 (18 U.S.C.A. § 88)). Dahly v. U.S., 8 Cir., 50 F.2d 37, 42."

[*Overt Act Proved*]

We find conclusive evidence of an overt act by the defendant Cline in his unexplained possession of dynamite in large quantities. His possession was unlawful according to the statutes of Tennessee. Moreover, he had made a statement that he had been offered $1,000 to blow up the Clinton Schoolhouse. We are justified in the conclusion that he had thus made preparation for carrying out the criminal conspiracy with his co-defendants. While it is true that Avon Nolan stated "he did not tell Cline he would help", yet he admits that he acted in furtherance of the design by helping Cline to load 156 sticks of dynamite into the latter's automobile and transferred it to his (Cline's) home, knowing the purpose for which it was to be used.

The assignments of error are overruled, and the judgment of the trial court is affirmed.

CIVIL RIGHTS STATUTES
State Action—Michigan

Elza John WATSON v. Frank DEVLIN et al.

United States District Court, Eastern District, Michigan, Southern Division, Nov. 6, 1958, 167 F. Supp. 638.

SUMMARY: A Michigan state prison inmate filed a suit for damages in federal district court, charging defendants with violating federal civil rights statutes by (1) conspiring to deny him equal protection of the laws through enticing him into the state and then falsely arresting and imprisoning him, (2) depriving him of due process of law by holding him incommunicado and without access to counsel during the period between arrest and arraignment, (3) arresting and maliciously prosecuting him without probable cause in violation of the Fourth Amendment, and (4) creating and introducing in evidence at the trial false criminal records concerning him. Plaintiff's motion for leave to proceed in forma pauperis was denied on the ground that the proposed complaint was frivolous and without merit. The court held that federal criminal code sections invoked by petitioner did not give it jurisdiction of a civil suit; that the judgment of conviction was an absolute defense to the present contention that the arrest and imprisonment were false and a denial of equal protection of the laws; and that the proposed complaint failed to allege facts to support the necessary "showing of clear and intentional discrimination." It was further held that none of the facts alleged concerning the arrest, arraignment, and trial showed a deprivation of constitutional rights supporting a cause of action under civil rights statutes.

FREEMAN, District Judge.

This is a suit filed by Elza John Watson, an inmate of the State Prison for Southern Michigan, now serving a sentence as a result of his conviction in a Michigan circuit court of the crime of arson. This matter is now before the court for determination of the petitioner's motion for leave to proceed in forma pauperis, made under Section 1915, 28 U.S.C.

That section provides, in part:

> "(a) Any court of the United States may authorize the commencement * * * of any suit * * * without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor * * *.
>
> "(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious."

According to the case law construing the provisions of this section, it is clear that this court may deny a petition for leave to proceed in forma pauperis if the court is satisfied that the petitioner's proposed complaint is frivolous, malicious or without merit.

In Mattheis v. Hoyt, D.C.1955, 136 F.Supp. 119, 125, Chief Judge Starr considered a motion for leave to proceed in forma pauperis under Section 1915, 28 U.S.C., and said:

> "It would be misleading, purposeless, and certainly unsatisfactory procedure to grant the plaintiff leave to file his complaint and proceed in forma pauperis, the court knowing well that the complaint would eventually be dismissed as being without merit and frivolous and malicious. Furthermore, to grant the plaintiff leave to proceed in forma pauperis would place an unnecessary and unjust burden on the defendants, as they would then be required to answer or move to dismiss his meritless, frivolous, and malicious complaint."

In the opinion of this court, petitioner's proposed complaint is frivolous and wholly without merit for the following reasons:

The complaint attempts to invoke the jurisdiction of the court under the provisions of Sections 1981, 1983 and 1985, 42 U.S.C.A., and Sections 241 and 243, 18 U.S.C., and sets forth, in a rambling, disconnected manner, the facts constituting the alleged basis of petitioner's claim for relief. The relief prayed for is money damages and release from custody.

[*No Jurisdiction*]

Initially, it is apparent that this court cannot assume jurisdiction of a civil action filed under Sections 241 and 242, 18 U.S.C. These sections are part of the criminal code and civil relief is not afforded by them. Smith v. Jennings, D.C. 1957, 148 F.Supp. 641. Also, Section 1981, 42 U.S.C.A., does not provide a civil cause of action for damages. Therefore, it is apparent that the jurisdiction of this court could be invoked only if the proposed complaint states a claim for which relief may be granted under Sections 1983 or 1985, 42 U.S.C.A.

The proposed complaint is set out in four separate causes of action. An analysis of each one of these counts shows that none of them states a claim for which relief may be granted.

Count One alleges a conspiracy of all the named defendants to deprive petitioner of his right to equal protection of the laws in that they enticed him into Michigan and then falsely arrested and imprisoned him. Under this count, there is no allegation of the facts surrounding this alleged false imprisonment; however, the facts are set forth in connection with the other remaining counts. On the basis of the facts alleged therein, it appears that petitioner was arrested, arraigned, tried by jury and convicted of the crime of arson. Under these circumstances, petitioner may not now contend that the original arrest was without reasonable cause. A judgment of conviction that is final may not be attacked collaterally and a criminal conviction constitutes an absolute defense to any later contention that the original arrest was without probable cause. Turbessi v. Oliver Iron Mining Co., 1930, 250 Mich. 110, 229 N.W. 454, 69 A.L.R. 1059. Therefore, petitioner's allegation of false arrest and imprisonment is controverted by the facts he alleges. This count thus fails to show that petitioner was deprived of the equal protection of the laws by the actions of defendants.

It has been held that in order to state a cause of action under Section 1985, 42 U.S.C.A., it must appear on the face of the complaint that there is present an element of intentional or purposeful discrimination, designed to favor one individual or class over another. There must be a showing of clear and intentional discrimination and a discriminatory purpose is not to be presumed. The mere use of the words "willful and malicious" will not suffice as a substitute for such allegations. Morgan v. Sylvester, D.C. 1954, 125 F.Supp. 380, affirmed 2 Cir., 220 F.2d 758, certiorari denied 350 U.S. 867, 76 S.Ct. 112, 100 L.Ed. 768, rehearing denied 350 U.S. 919, 76 S.Ct. 201, 100 L.Ed. 805; Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497; State of Ark. for Use and Benefit of Temple v. Central Sur. & Ins. Corp. of Kansas City, Mo., D.C.Ark., 102 F.Supp. 444. This complaint wholly fails to allege facts showing such conduct.

[*Due Process Question*]

Count Two alleges a deprivation of due process of law in that petitioner was arrested and held incommunicado until his arraignment and denied access to his counsel during that period. The facts alleged throughout this complaint show clearly that petitioner was tried by jury for the offense committed and there is no showing of any use by the prosecution of any detrimental evidentiary matter extracted from him during his period of detention. It is clear on these facts that no plea of guilty was accepted from him by the court on his arraignment and that he was allowed counsel thereafter. These facts do not show any deprivation of any federal constitutional right and this count therefore fails to state a cause for action under Section 1983, 42 U.S.C.A. State of Utah v. Sullivan, 10 Cir., 1956, 227 F.2d 511.

The third count of the proposed complaint constitutes an attempt by petitioner to recover damages against defendants for malicious prosecution. This count invokes no statute of the United States and contains no allegation of any deprivation of any of petitioner's federal constitutional rights, except for a statement that arrest and prosecution without probable cause is in violation of the Fourth Amendment to the Constitution. The arrest was made by state officers and this allegation is without merit. The count fails to state any claim for which this court can grant relief.

The fourth count contains an allegation that defendants created false criminal records pertinent to petitioner and introduced them in evidence against him at his trial. Such a statement clearly does not present any matter relevant to petitioner's claims under Sections 1983 and 1985, 42 U.S.C.A. Petitioner has made no showing and does not allege that he was deprived of any federally protected right during his trial in the state court and it is not the function of this court to review valid state court proceedings.

[*Other Defects*]

There are other substantial defects in the proposed complaint, but further analysis of the mass of papers presented to this court by petitioner is unnecessary, since each of the four counts fails to state any claim for which relief may be granted. Petitioner was arrested on a warrant, arraigned, tried by a court before a jury and convicted. He does not allege any constitutional defect in these proceedings and his contention that the original arrest was without reasonable cause is without merit, in view of his subsequent conviction. If this court permitted petitioner to proceed in forma pauperis, it is obvious that this complaint would be dismissed on motion by defendants. It would be a miscarriage of justice to put the proposed defendants to the burden of retaining counsel and appearing to defend this obviously meritless and frivolous action.

Therefore, it is ordered that the motion for leave to proceed in forma pauperis is hereby denied.

CIVIL RIGHTS STATUTES
State Action—New York

Thomas O. SPAMPINATO v. M. BREGER & CO., Miles Breger, et al.

United States District Court, Eastern District, New York, August 28, 1958, 166 F. Supp. 33.

SUMMARY: In a suit in federal district court for damages for alleged libel and slander, plaintiff, a private individual acting pro se, based his claim for federal jurisdiction solely upon the Civil Rights Act. The court dismissed the complaint against defendants, private persons, stating that plaintiff had misconceived the scope of the Act, which does not apply to an invasion of an individual's personal rights by another individual not acting under color of state law, in the absence of a conspiracy to deprive a person, or class of persons, of equal protection of the laws or equal privileges and immunities under the law.

ZAVATT, District Judge

* * *

No diversity of citizenship between the plaintiff and defendant Miles Breger is alleged in either the said amended complaint or the "supplemental amended complaint". Rather, the plaintiff rests his claim of jurisdiction upon the Civil Rights Act, as amended September 3, 1954, 68 Stat. 1241, 28 U.S.C.A. § 1343, and §§ 1983, 1985 and 1986 of Title 42 U.S.C.A.

The plaintiff has quite misconceived the scope of the Civil Rights Statute. The Civil Rights Act was enacted to enforce the Fourteenth Amendment to the Constitution, which amendment is directed only to state action. The invasion by individuals of the rights of other individuals is not within the purview of said amendment. The jurisdiction conferred upon the federal district courts is similarly limited. Redress for the invasion by an individual, who is not acting under color of state law, of the private rights of another must be sought in the state courts, absent diversity of citizenship, unless two or more persons conspire to deprive a person or class of persons of the equal protection of the laws or of equal privileges and immunities under the law, or for the purpose of preventing or hindering the constituted authorities from giving or securing to all persons the equal protection of the laws [*citing many cases*].

* * *

The clerk will enter an order dismissing the complaint against defendants M. Breger & Co., Inc., and Miles Breger.

DECLARATORY JUDGMENTS
Libel—Maryland

The PEOPLE of the United States of America, by their next friend, James M. Burke, and James M. Burke v. William C. ROGERS, Attorney General of the United States, et al.

United States District Court, Maryland, December 31, 1958, 168 F.Supp. 573.

SUMMARY: A complaint, filed in federal district court in Maryland by a named individual on behalf of the "People of the United States of America" against fifteen high officials in the federal government, alleged libel against "a Sovereign People" and several nationally famous deceased persons, and claimed very substantial actual and punitive damages. Plaintiff also sought a declaratory judgment that defendants have "transgressed the Constitution," that the Department of Justice has no right to participate in "private litigation," and that the Chief Judge of the Court of Appeals for the Fourth Circuit is disqualified to sit in segregation cases. The complaint was dismissed for failure to allege facts upon which relief could be granted.

THOMSEN, Chief Judge

This case is before the court on the motion of the defendant William P. Rogers, Attorney General of the United States, to dismiss the amended complaint filed by James M. Burke in proper person, naming as plaintiffs "The People of the United States of America, by their next friend, James M. Burke, and James M. Burke". The fifteen defendants are "William C. (sic) Rogers, an officer of the United States appointed to the office of Attorney General of the United States", the Chief Justice and seven Associate Justices of the Supreme Court, the Chief Judge of the United States Court of Appeals for the Fourth Circuit, and five other persons connected with the Department of Justice, all of whom are described as officers of the United States, appointed to their several offices.

The amended complaint, which is headed "Complaint Against the Libel of a Sovereign People and of the Late Senator George, of Georgia, the Late Chief Justice Marshall, the Late Chief Justice Hughes, Late Associate Justice Holmes, and for Other Relief" sets out a large number of alleged acts by the various defendants which Burke conceives to be in violation of the Constitution of the United States. The concluding paragraphs, which read more like a proclamation than prayers for relief, claim "actual damages" in the amount of $175,000,000 and "punitive damages" in the amount of $168,000,000,000. Burke says that he also seeks a declaratory judgment that the defendant officers have "transgressed the Constitution", that the Department of Justice has no right to participate in "private litigation", such as Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5, and that Judge Sobeloff is disqualified to sit in any segregation cases or any other cases involving "the supreme law of the land" (358 U.S. 18, 78 S.Ct. 1410) because he participated in the final argument of Brown v. Board of Education, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083.

This court has no jurisdiction to grant most of the relief prayed, although in a proper case, it can enter a judgment for money damages.

The complaint alleges no facts upon which relief can be granted. It is therefore dismissed, with costs.

ELECTIONS
Registration—Civil Rights Act

In re: George C. WALLACE, W. A. STOKES, Sr., Grady ROGERS, W. F. LIVINGSTON, M. T. EVANS, and J. W. SPENCER.

U. S. District Court, Middle District of Alabama, Northern Division, CA 1487-N, December 11, 1958-January 26, 1959.

SUMMARY: The United States Civil Rights Commission held hearings on December 8-9, 1958, at Montgomery, Alabama, to investigate allegations of the denial of registration to Negroes (4 Race Rel. L. Rep. 200, *infra*). At that time, certain officials of the state of Alabama refused to testify and produce subpoenaed documents on constitutional grounds, and the commission referred the record to the United States Attorney General for action (4 Race Rel. L. Rep. 206, *infra*). The Attorney General then made application to the U.S. District Court at Montgomery for an order requiring the appearance of the witnesses and records. This order was granted.

Application for Order to Produce Evidence

December 11, 1958

Comes now the Attorney General of the United States and makes this application on behalf of the Commission on Civil Rights, and represents to the Court as follows:

1. The Commission on Civil Rights, a part of the executive branch of the government of the United States, was established by Act of Congress approved September 9, 1957. (Public Law 85-315, 71 Stat. 634)

2. That pursuant to the authority vested in said Commission by the aforesaid Act of Congress, the Commission set for hearing and investigation on December 8, 1958, at Montgomery, Alabama, allegations of complaints by citizens of the United States, concerning the deprivation of their right to vote and to have their votes counted by reason of their color, or race, and for the purpose of studying and collecting information concerning legal developments constituting a denial of equal protection of the laws under the Constitution of the United States, in Macon County, Bullock County, and Barbour County, in the State of Alabama, and elsewhere in the State of Alabama.

3. That the said Commission, pursuant to authority of the said Act of Congress caused to be issued subpoenas on George C. Wallace, W. A. Stokes, Sr., Grady Rogers, E. P. Livingston, M. T. Evans, and J. W. Spencer, which subpoenas were duly served calling for the appearance and testimony of those said individuals and the production of written matter in the nature of voter registration records, files and documents which were specifically identified in the said subpoenas, before the said Commission on December 8, 1958, in Montgomery, Alabama, after having tendered to said persons mileage fees as required by said Act.

4. That on the aforementioned day and time prescribed in said subpoena to him, the Commission having duly convened, the said George C. Wallace failed and refused to appear.

5. That the said W. A. Stokes, Sr., Grady Rogers, E. P. Livingston, M. T. Evans, and J. W. Spencer appeared before the Commission at the duly appointed time and place specified in the said subpoenas, but each and every one of said persons refused to take an oath or affirmation, and refused to testify before the said Commission notwithstanding the fact that the Chairman of the Commission specifically directed the said persons to be sworn, and said persons failed to produce the written matter specified in said subpoenas.

6. That as more fully appears from the attached affidavit of Gordon M. Tiffany, which is attached hereto as Exhibit 1, the Commission on Civil Rights cannot accomplish its statutory duty to investigate allegations involving deprivations of the right to vote and study and collect information concerning legal developments constituting a denial of equal protection of the laws

under the Constitution of the United States unless the said subpoenaed matter and testimony are produced.

WHEREFORE, the premises considered, the Attorney General of the United States, pursuant to the authority of 42 U.S.C. 1975(g) of said Act of Congress, applies to this Court to issue an order to George C. Wallace, W. A. Stokes, Sr., Grady Rogers, E. P. Livingston, M. T. Evans, and J. W. Spencer requiring them and each of them to appear before said Commission on December 19, 1958, at Room 432 in the Federal Building in Montgomery, Alabama, at 3:00 o'clock P.M., there to produce the evidence and to give the testimony called for in the subpoenas heretofore served on them.

BY DIRECTION OF:
WILLIAM P. ROGERS
Attorney General of the
United States

Exhibit I

AFFIDAVIT

Gordon M. Tiffany, having been duly sworn, deposes and says: That he is the duly appointed Staff Director of the United States Commission on Civil Rights established pursuant to the Act of September 9, 1957, Public Law 85-315; 85th Congress, and that the following statements are made of his own personal knowledge and in his official capacity as Staff Director of the Civil Rights Commission for the purposes of and for use in the above captioned matter:

1. That the United States Commission on Civil Rights received certain allegations in writing and under oath or affirmation that certain citizens of the United States were being deprived of their right to vote and have that vote counted by reason of their race or color, in Macon County, Bullock County, and Barbour County, in the State of Alabama, and elsewhere in the State of Alabama,

2. That pursuant to a unanimous vote of said Commission a hearing was scheduled and held on December 8th, 1958, in the City of Montgomery, State of Alabama, for the purpose of investigating such allegations concerning deprivations of the right to vote, and for the purpose of studying and collecting information concerning legal developments constituting a denial of equal protection of the laws under the United States Constitution,

3. That to effectuate the purposes described above in paragraph 2 the Commission on Civil Rights caused to be served certain subpoenas issued pursuant to applicable laws and regulations calling for the appearance of certain persons for the purpose of eliciting testimony and calling for the production of certain written matter in the nature of voter registration records, files and documents which were required for purposes of the Commission's investigation and study.

4. That a subpoena of the nature described above in paragraph 3, a copy of which is attached hereto as Exhibit "A" and herein incorporated by reference, was duly issued and served upon George C. Wallace on December 4, 1958, requiring his appearance on December 8, 1958, at 9:00 A.M. at the hearing described in paragraph 2, to give testimony and to produce the written matter described by said subpoena which materials were deemed necessary for the purpose of the Commission's inquiry,

5. That subpoenas of the nature described above in paragraph 3, copies of which are attached hereto as Exhibits "B", "C", "D", "E", "F" and herein incorporated by reference, were duly issued and served upon W. A. Stokes, Sr. on December 1, 1958; Grady Rogers on December 2, 1958; E. P. Livingston on December 2, 1958; M. T. Evans on December 1, 1958; J. W. Spencer on December 1, 1958, requiring each of the said individuals to appear on December 8, 1958, at 9:00 A.M. at the hearing described in paragraph 2, to give testimony and to produce the written matters described by said subpoenas which materials were deemed necessary for the purpose of the Commission's inquiry,

6. That George C. Wallace failed to appear and to produce written matter before the Civil Rights Commission at the hearing in Montgomery, Alabama, on December 8, 1958, nor was he excused by said Commission from so appearing or from so producing written matter,

7. That the aforementioned W. A. Stokes, Sr., Grady Rogers, E. P. Livingston, M. T. Evans, and J. W. Spencer appeared at the December 8, 1958 Hearing of the Commission on Civil Rights but although directed to take an oath or affirmation and so ordered by the

Chairman of the Commission the said W. A. Stokes, Sr., Grady Rogers, E. P. Livingston, M. T. Evans, and J. W. Spencer each refused to take an oath or affirmation and refused to give testimony under oath or affirmation,

8. That on December 10, 1958, in accordance with the Act of Congress approved September 9, 1957 (Public Law 85-315), John A. Hannah, Chairman of the Commission on Civil Rights duly constituted a Subcommittee of the Commission to convene at Room 432, Federal Building in Montgomery, Alabama, at 3:00 P.M., Friday, December 19th, 1958, for the purpose of receiving testimony or examining written matter.

s/ Gordon M. Tiffany

* * *

Exhibit A

[*Exhibit A consists of the subpoena and return to Circuit Judge George C. Wallace. Attached to the subpoena, and incorporated by reference, is the following list of documents to be produced:*]

(1) Official register of qualified voters (Sec. 50 & 54).

(2) Orders for disbursement of State funds to members of Board of Registrars, Jan. 1, 1955 thru Nov. 18, 1958 (Sec. 24(1)).

(3) All names registered in Bullock County each year for years 1956, 1957 & 1958 as furnished by Board of Registrars (Sec. 54).

(4) All names registered in Bullock County each year for years 1956, 1957 & 1958 as compiled by Judge of Probate (Sec. 54).

(5) Records of Board of Registrars containing application, questionnaire and oath for each applicant for years 1956, 1957 & 1958 (Sec. 31).

(6) Alphabetical list of all electors registered or re-registered by precincts, districts, subdivisions or wards as submitted to a newspaper of general circulation for publication in years 1954, 1956 & 1958 (Sec. 38).

(7) Notices of hearings for the purpose of purging the list of registered electors as sent to all persons in the years 1955, 1956, 1957 & 1958, together with Sheriff's return of service of such notices or the return receipt for registered mail sent with such notices, or the notice published in a newspaper in the county (Sec. 48(1)).

(8) Book containing list of those purged from registration and/or re-registration lists for each of the years 1956, 1957 & 1958 (Sec. 49).

(9) All of the above items (1) through (8) for Barbour County, Alabama, as well as for Bullock County, Alabama.

[*All section numbers refer to Title 17, Code of Alabama, 1940, as amended.*]

Exhibits B-F

[*Exhibit B consists of the subpoena and return to W. A. Stokes Sr., of the Barbour County Board of Registrars; Exhibit C to Grady Rogers, of the Macon County Board; Exhibit D to E. P. Livingston of the Macon County Board; Exhibit E to M. T. Evans of the Bullock County Board; Exhibit F to J. W. Spencer of the Barbour Board.*]

Order to Produce

Upon consideration of the application of the Attorney General of the United States, and it appearing that George C. Wallace, W. A. Stokes, Sr., Grady Rogers, E. P. Livingston, M. T. Evans, and J. W. Spencer, have been duly served with subpoenas by the Commission on Civil Rights as required by Act of Congress, approved September 9, 1957, to produce voter registration records, files, and other documents before said Commission on December 8, 1958, at 9 a. m., in Montgomery, Alabama, and to give testimony touching the matter of allegations of complaints by citizens of the United States concerning the deprivation of their right to vote and to have their votes counted by reason of their color or race, and it appearing further that George C. Wallace has failed to appear before said Commission and W. A. Stokes, Sr., Grady Rogers, E. P. Livingston, M. T. Evans, and J. W. Spencer, have failed to produce the evidence called for in said subpoenas, and have refused to obey said subpoenas, it is, therefore,

ORDERED that George C. Wallace, W. A. Stokes, Sr., Grady Rogers, E. P. Livingston, M.

T. Evans, and J. W. Spencer, be, and each of them hereby is, directed and ordered to appear before said Commission, or any authorized subcommittee thereof, on December 19, 1958, at 3 p.m., at Room 432 in the Federal Building in Montgomery, Alabama, and from time to time thereafter as may be required by said Commission, or authorized subcommittee thereof, and then and there produce the records called for in the subpoenas heretofore served on each of them, and to give testimony before said Commission, or authorized subcommittee thereof, touching upon the aforesaid matter, and it is further

ORDERED that a copy of this order be served forthwith upon the persons of George C. Wallace, W. A. Stokes, Sr., Grady Rogers, E. P. Livingston, M. T. Evans, and J. W. Spencer, by the United States Marshal for this district.

Done, this the 11th day of December, 1958.

FRANK M. JOHNSON, JR.

Motion by Judge Wallace

On December 16, Circuit Judge George C. Wallace, one of those named in the order of December 11, appeared specially and asked alternatively for vacation of the order or its suspension pending a hearing on objections to it:

To The Hon. Frank M. Johnson, Jr.,
United States District Judge For The
Middle District Of Alabama:

Appearing specially for the purpose of this motion and without admission of jurisdiction or authority in this Court to issue the subpoena herein mentioned especially on an ex parte application without notice or hearing, George C. Wallace, both in his individual capacity and as sole Judge of the Third Judicial Circuit of the State of Alabama composed of the Counties of Barbour, Bullock and Dale, respectfully represent:

1. The above entitled proceeding was instituted by an ex parte application filed herein on December 10, 1958, by or on behalf of an investigative executive agency known as the Commission on Civil Rights (Public Law 85-315, 85th Congress, H. B. 6127).

2. No service or notice of the filing of the said application was requested by the application or given in fact either by the Attorney General of the United States or by the Court and movant had no knowledge of the filing or presentation of the said application.

3. The subpoena to movant referred to in Paragraph 3 of the application of the Attorney General herein was served on movant on December 4, 1958, in movant's office in the Circuit Court of the State of Alabama in Clayton, Alabama, when the movant was actively engaged in his duties as Circuit Judge. Said subpoena summarily commanded movant to lease his judicial circuit and appear before the Commission on Civil Rights at Montgomery, Alabama, outside of movant's circuit and more than 75 miles from Clayton. Movant had, prior to the issuance of said subpoena, set cases for hearing during the week beginning December 8, 1958, and movant's obligations and responsibilities as a Circuit Judge of Alabama pursuant to his oath of office, required that he be present at the Courthouse in Clayton to all regular hours during said week.

4. No motion or request, formal or informal, was made to movant by or on behalf of the Commission on Civil Rights or the Attorney General of the United States for the production of records or the disclosure of information prior to the service upon the summary subpoena of the Commission.

5. In fact, George C. Wallace, as Judge of the Third Judicial Circuit of Alabama, had on October 29, 1958, and November 21, 1958, by proper orders of the Court impounded the registration information of Barbour and Bullock Counties which information was sought by the summary subpoena of the Commission, and which said orders were in full force and effect at the time of the service of said subpoena on movant and are to this day in full force and effect.

6. The said subpoena in addition to the summary command to movant to leave his Judicial Circuit and to attend upon the Commission for an indefinite time (said subpoena directed movant inter alia "not to depart without leave of said Commission"), also purported to require

movant as Circuit Judge to remove from the Circuit and produce numerous official documents including the official register of qualified voters for two of the three counties in movant's Circuit, Barbour and Bullock, covering a period of three entire years.

7. Movant, as Circuit Judge of the Third Judicial Circuit of Alabama, has heretofore set cases for trial on the date upon which the summary order of this Court dated December 11, 1958, requires movant to appear before said Commission in Montgomery. Said order of December 11th also would require movant to appear before said Commission or any authorized subcommittee thereof, "from time to time thereafter as may be required by said Commission or authorized subcommittee thereof," without reference to or apparent consideration of the fact that movant is obligated by law to be present within his Circuit and responsive to his judicial obligations therein at all times.

PREMISES CONSIDERED, movant requests that the order entered herein on December 11, 1958, by Honorable Frank M. Johnson, Jr., United States District Judge, be rescinded, vacated and annulled and that the application filed herein on December 10, 1958, be denied and dismissed. In the alternative movant requests that the Court suspend said order of December 11, 1958, pending hearing of movant's objections to said application.

For grounds of this motion movant respectfully says:

A. The ex parte application filed December 10, 1958, on the part of the Attorney General of the United States is not authorized by the Act of Congress under which it purports to be filed (Public Law 85-615, 71 Stat. 634).

B. If the ex parte and summary procedure invoked by said application and followed by the order of December 11, 1958, is held to be authorized by said Act of Congress the same is unconstitutional and void.

C. The order of December 11, 1958, having been entered without notice to movant or without affording him any opportunity to be heard thereon, would if not suspended constitute a violation of movant's rights under the Fifth Amendment to the Constitution of the United States in that the same would deprive movant of his liberties without due process of law.

D. The subpoena heretofore served upon movant and said order of December 11th would require the movant to violate the law of Alabama by removing judicial and other records from their place of official custody and transporting them outside the jurisdiction of their statutory location, contrary to the provisions of Title 7, Section 3 of the Code of Alabama of 1940 and other laws.

E. This Court was and is without jurisdiction to enter the summary order of December 11, 1958.

F. The subpoena of the Commission and order of December 11, 1958, if enforced would constitute an unconstitutional invasion of the rights and sovereignty of the State of Alabama.

G. The enforcement of the order of December 11, 1958, would violate the obligation of comity between state and federal courts of coordinate jurisdiction under the Constitution of the United States.

H. The subpoena of the Commission and the order of December 11, 1958, are unnecessary and beyond the reach and purpose of Article VI of the Constitution of the United States.

I. The Constitution and laws of the State of Alabama provide adequate judicial processes for inquiring into the judicial acts of the movant. The subpoena issued by the Commission, if enforced, would be an improper inquiry into such acts.

J. The Constitution and laws of the State of Alabama provide adequate judicial processes for relief of any alleged violations of all civil rights and the actions of this Commission are an improper invasion of the powers of the judiciary in this field.

K. The Circuit Court of the Third Judicial Circuit of Alabama having lawfully assumed the jurisdiction of the registration information sought in this matter, this Court does not have jurisdiction to compel the movant to bring the said records before the Civil Rights Commission.

Respectfully submitted,

George C. Wallace, Individually and as Judge of the Circuit Court of the State of Alabama for the Third Judicial Circuit.

JOHN PATTERSON
ATTORNEY GENERAL OF ALABAMA
ATTORNEY FOR MOVANT

Motion to Vacate and Quash

On the same date, other parties named in the order of December 11 asked the court to vacate the order and quash the subpoenas:

Come now W. A. Stokes, Sr., Grady Rogers, E. P. Livingston, M. T. Evans and J. W. Spencer, separately and severally, and move the court (i) to vacate its order dated December 11, 1958, in the above styled cause requiring movants to appear before the Commission on Civil Rights and to produce upon such appearance certain records; (ii) to quash the subpoenas dated November 29, 1958, issued by the movants. Movants, separately and severally, state the following grounds for this their motion.

1. The said order is invalid and contrary to law.

2. The subpoenas issued by the Commission to the movants, compliance with which is required by the said order of this court, were invalid and contrary to law.

3. The records required to be produced are too voluminous to be brought from the place in which they are now located.

4. To the extent that the Civil Rights Act of 1957 purports to empower the Commission to issue subpoenas and district courts of the United States to coerce compliance with such subpoenas, such Act is invalid in that it involves an improper delegation of legislative powers entrusted exclusively to the Congress of the United States.

5. The subpoenas which this Court has ordered enforced require the movants to appear at a hearing stripped of all dignity and to subject themselves to television broadcasts and other publicity staged by or with the sanction of publicity agents hired by the Commission.

6. The subpoenas and the order of this court are violative of the due process requirements of the Fifth Amendment of the Constitution of the United States.

7. The Civil Rights Act of 1957 does not authorize the Commission or this court to require movants to remove public records of the State of Alabama from the county or judicial circuit in which such records are made and kept. To the extent that the Act can be so construed it is invalid.

8. That the order of the court requiring the production of all records for the said years violates the investigative limitations prescribed in Section 104(a)(1) of the Civil Rights Act of 1957 restricting the investigation to allegations in writing under oath or affirmations that certain citizens of the United States are being deprived of their right to vote.

With respect to movants W. A. Stokes, J. W. Spencer, and M. T. Evans, separately and severally, the following additional grounds are stated:

a. Movants Stokes and Spencer are members of the Board of Registrars of Barbour County, Alabama. Movant Evans is a member of the Board of Registrars of Bullock County, Alabama. As such, under the Constitution of the State of Alabama, they are judicial officers of the state. The Civil Rights Act of 1957 does not empower the Commission or this court to compel them to appear or to testify with respect to acts done in their judicial capacity. To the extent that the Act may be so construed, it is invalid as being beyond the powers delegated to the Congress of the United States.

b. The records which these movants are ordered to produce are in the custody of the court for the Third Judicial Circuit of Alabama and are beyond the control and custody of these movants.

With respect to movants Grady Rogers and E. P. Livingston, separately and severally, the following additional grounds are stated:

c. Movants Rogers and Livingston were members of the Board of Registrars of Macon County, Alabama, at the time the subpoenas of the Commission were served upon them. Thereafter these movants resigned as members of said Board of Registrars; prior to service of the order from the Federal District Court in this cause, however, as members of such Board, under the Constitution of the State of Alabama, they were judicial officers of the State. The Civil Rights Act of 1957 does not empower the Commission or this court to compel them to appear or to testify with respect to acts done in their judicial capacity. To the extent that the Act may be so construed,

it is invalid as being beyond the powers delegated to the Congress of the United States.

d. The records which these movants are ordered to produce are not in their custody, and they have no control over, or access to, such records.

Movants further move this court to set this motion for hearing and to stay its order dated December 11, 1958, pending the determination of this cause upon the merits.

s/ John Patterson
Attorney for Movants

Order Allowing Hearing

On the next day, the court considered the motions and ordered a hearing on the issues raised:

ORDER

This cause is now presented and submitted to this Court upon the motion of W. A. Stokes, Sr., Grady Rogers, E. P. Livingston, M. T. Evans, and J. W. Spencer, filed separately and severally on the 16th day of December, 1958; said motion seeks to have this Court vacate its order dated December 11, 1958, which order was entered and filed in this cause and which order required these movants to appear before the Commission on Civil Rights at 3 p.m., on December 19, 1958, and to then and there produce certain designated records; said motion also seeks to have this Court vacate and quash the subpoenas dated November 29, 1958, which subpoenas were issued to these movants by said Commission on Civil Rights. This cause is also presented and now submitted upon the motion of George C. Wallace, "Individually and as Circuit Judge of the Third Judicial Circuit of Alabama," seeking to have this Court rescind, vacate and annul the order of this Court entered on December 11, 1958, or, in the alternative, suspend said order, pending hearing of certain objections thereto.

Upon consideration of said motions, this Court is of the opinion that certain of the grounds set up in support thereof are frivolous and without merit. However, this Court is also of the opinion that certain of the grounds set up in support thereof relate to substantial legal questions and, for that reason, this Court considers that an opportunity should be granted all parties concerned to be heard upon said motions in open court. Since the order of this Court that movants seek to have rescinded, quashed and vacated, requires compliance therewith by said movants at 3 p.m. on December 19, 1958, it will be impractical for all parties concerned to prepare, present, and for this Court to hear said matter by that date. This Court is, therefore, of the opinion that the order of December 11, 1958, insofar as it designates the time movants are to comply therewith should be amended to require the above-named movants to comply therewith by producing the designated records and/or testifying before said Commission in Room F-4, in the Federal Building at Montgomery, Alabama, at 10 a.m., on January 9, 1959.

It has been orally stipulated and agreed by and between the above-named movants, said stipulation being entered into by the Honorable John Patterson, Attorney General for the State of Alabama, as their attorney of record, and the Attorney General of the United States, he being represented by the Honorable Hartwell Davis, the United States Attorney for this district, that said order of this Court dated December 11, 1958, entered and filed in this cause, may be so amended without objection to said amendment and without any further service or notice thereof upon any of the movants.

It is, therefore, in consideration of the foregoing and for good cause shown, the ORDER, JUDGMENT and DECREE of this Court that the order of this Court entered in this cause on December 11, 1958, be and the same is hereby amended by striking therefrom "December 19, 1958, at 3 p.m., at Room 432" and inserting in lieu thereof "January 9, 1959, at 10 a.m., at Room F-4"; said order in all other respects to remain unchanged.

It is the further ORDER, JUDGMENT and DECREE of this Court that the motion of W. A. Stokes, Sr., Grady Rogers, E. P. Livingston, M. T. Evans, and J. W. Spencer, and the motion of George C. Wallace, be and each is hereby set for hearing before this Court at 10 a.m., January 5, 1959.

It is further ORDERED that the parties to this cause file with this Court comprehensive written

briefs, setting out in full the facts and the law upon which they rely in support of and in opposition to said motions; said briefs to be filed not later than 10 a.m., December 31, 1958.

The Clerk of this Court is DIRECTED to forward certified copies of this order to counsel of record of all parties concerned, said copy being, under the oral stipulation hereinabove referred to, sufficient service and notice of same.

Done, this the 17th day of December, 1958.

s/ Frank M. Johnson, Jr.
United States District Judge

Order for Examination of Records, January 5, 1959

On January 5, the U.S. District Court ordered the voter registration records in Barbour, Bullock and Macon counties to be made available to the Commission's representatives.

This cause coming on to be heard on the motions of respondents to set aside or amend the order entered herein on December 11, 1958, pursuant to the order herein dated December 17, 1958, and the same having been submitted on affidavits as to certain facts filed on behalf of respondents, and the same having been considered and discussed by counsel for all the parties and for the State Bar of Alabama as Amicus Curiae, in open court,

It is ORDERED, ADJUDGED AND DECREED that the order heretofore issued on December 11, 1958, be and it is, by agreement of counsel, hereby modified to read as follows:

1. The Commission on Civil Rights and its authorized agents has the right to inspect official voter registration records of the State of Alabama in Barbour, Bullock and Macon counties to the extent that same are relevant to the Commission's inquiry and in a manner consistent with proper preservation and use of the records by State authorities. The inspection of the records should be carried out by the Commission's representatives in the various counties and at the places where the records are kept.

2. To the end that said inspection of the records shall not interfere with the proper judicial processes of the State of Alabama, the times and places of inspection of the records by the Commission's representatives should be mutually agreed upon between the custodians of the records and the representatives of the Commission.

3. Opportunity for the inspection described above in paragraph 1 and 2 herein shall be afforded and actual inspection of the records designated herein shall be accomplished prior to January 9th, 1959.

4. The jurisdiction of this cause is retained for application on behalf of the Commission to the court for more specific orders with respect to production of records and testimony of custodians of records and respondents.

DONE, this 5th day of January, 1959.

Frank M. Johnson, Jr.
United States District Judge.

Motion for Further Relief of January 9, 1959

Subsequently, the U.S. Attorney General asked for further relief:

Comes now the petitioner, the Attorney General of the United States, by his attorneys and for the purposes of further specific relief in this cause in accordance with paragraph 4 of the order entered herein January 5, 1959, represents to this Court as follows:

1. Authorized representatives of the Commission on Civil Rights in accordance with paragraphs 1 and 2 of the above mentioned order endeavored to make arrangements with the representatives of respondents as to the times and places when and where the voting records of Macon, Barbour and Bullock Counties, of the State of Alabama, would be available for inspection.

2. The records of Macon County were made available for inspection and were inspected by Commission representatives with the full coop-

eration of Respondents Grady Rogers and E. P. Livingston and as more fully appears from the letter of Gordon M. Tiffany, Staff Director of the Civil Rights Commission, to the Attorney General of the United States, a copy of which is attached hereto as Exhibit A and incorporated herein by reference, the Commission purposes in respect to this area have been fully served.

3. That authorized representatives of the Commission on Civil Rights undertook with diligence and in good faith to obtain access to and to inspect the voting records of which Respondent George C. Wallace had assumed custody, but that due to the dilatory and obstructive tactics of said Respondent Wallace inspection in accordance with this Court's prior order of January 5, 1959, was rendered impossible.

4. That notwithstanding the fact that this Court had made it clear to counsel for all parties herein immediately prior to signing the order of January 5, 1959, which embodied the agreement of counsel for all parties, that the records to be made available for inspection constituted all the voting records of which the Commission had sought production, Respondent Wallace refused to permit such inspection with respect to the records of Barbour and Bullock Counties except to the extent that the registration applications of three persons were produced.

5. The facts constituting such refusal of Respondent Wallace described in paragraph 4 are more fully set out in the affidavits of Charles E. Clark and Berl I. Bernhard, attached hereto as Exhibits B and C, respectively, and herein incorporated by reference.

6. That such refusal by Respondent George C. Wallace to make said records available to representatives of the Commission was in direct disobedience to and violation of the order of this Court entered on January 5, 1959 of which Respondent had been given notice and explanation through counsel at the time of signing of said order.

Wherefore the premises considered petitioner respectfully moves this court to:

(a) Enter as dismissed so much of this cause as pertains to the production of records and the necessity for testimony before the Civil Rights Commission of Respondents Grady Rogers and E. P. Livingston.

(b) Enter an appropriate order for more specific relief against Respondent George C. Wallace to compel obedience to the order of this Court of January 5, 1959 so that representatives of the Commission can inspect all the official voter registration records of Barbour and Bullock Counties in his custody.

(c) Retain jurisdiction of this cause with respect to Respondents W. A. Stokes, Sr., M. T. Evans, J. W. Spencer, and other custodians of voting records in Barbour and Bullock Counties for application on behalf of the Commission to the Court for more specific orders with respect to testimony and production of records if such relief should prove necessary.

(d) And for any such other relief that this Court deems just and proper under the circumstances.

Respectfully submitted,

s/ Joseph M. F. Ryan, Jr.
First Assistant to
Assistant Attorney General
s/ D. Robert Owen
Attorneys, Department of Justice

Exhibit A

COMMISSION ON CIVIL RIGHTS
WASHINGTON 25, D. C.

January 9, 1959

The Honorable W. Wilson White
Assistant Attorney General
Civil Rights Division
U. S. Department of Justice
Washington 25, D. C.

In Re: George C. Wallace and others, Civil Action No. 1487-N

Dear Mr. White:

This will acknowledge with appreciation your letter of January 8, 1959, in which you have stated your understanding that the materials produced by the state officials pursuant to the order of January 5, 1959, in the above matter has obviated the need for any specific orders compelling testimony of respondents or requiring production of any additional written material.

You have requested that if this understanding is in error we should call it to the attention of the Department of Justice so that proper application for relief may be made to the United States District Judge at the time of the report to the Judge on January 9, 1959.

I am gratified to say that the following per-

sons who had custody of the records in Macon County, namely, Messrs. Rogers and Livingston, have compiled with the requests of the representatives of this Commission to produce all voter registration records.

However, at a meeting held in Montgomery on the evening of January 8, 1959, the Commission considered the confidential report of its representatives in which it appeared that, although repeated efforts were made in establish contact and determine a mutually agreeable time for inspection, and although the representatives of the Commission presented themselves before Judge Wallace at the Clayton Courthouse in Barbour County at or about 10:00 in the morning on Thursday, January 8, and requested the records in order to conduct their examination, they were, in fact, denied the right of a full examination of the voter registration records of Bullock and Barbour Counties which are in the custody of that court.

With careful persistence, the representatives of the Commission pressed their request throughout the day without success, except as to the applications of three applicants.

Under the circumstances as I have described them, it would, of course, be impossible for this Commission to adequately and faithfully perform the functions for which it was created by the Congress as a fact-finding organization set up to make recommendations to the President and to the Congress and to investigate complaints alleging the denial of the right to vote because of race or color. It had, therefore, become necessary in the course of these recent developments for us to bring the matter to the attention of your Department for the proper applications as suggested in your letter.

A copy of this letter has been given in hand to your first assistant, Mr. Joseph M. F. Ryan, Jr., in Montgomery, Alabama.

Sincerely yours,
Gordon M. Tiffany
Staff Director

Exhibit B

STATE OF ALABAMA)
)
MONTGOMERY COUNTY)

AFFIDAVIT

Charles E. Clark, having been duly sworn, deposes and says: That he is an employee of the Commission on Civil Rights and that in such capacity he has been assigned and is presently serving on a voting study team.

1. That together with three other duly authorized representatives of the Commission on Civil Rights, A. H. Rosenfeld, Burton Stevenson and Berl I. Bernhard, he went to Tuskegee, Alabama on Wednesday, January 7, 1959, for the purpose of examining voter registration records of Macon County, Alabama, under the authority of an order entered by this Court in Civil Action No. 1487-N on January 5, 1959.

2. That deponent and one other representative of the Commission were to proceed to Eufaula, and/or Clayton, and/or Union Springs, Alabama for the purpose described in paragraph 1 herein to examine the voting registration records in Barbour and Bullock Counties.

3. That in the presence of deponent at approximately 9:30 A.M., January 7, 1959, Mr. Rosenfeld, pursuant to arrangements made with the appropriate officials of the State of Alabama as contemplated by the order of the Court herein dated January 5, 1959, made efforts to contact Archie Grubb, an attorney in Eufaula, Alabama, for the purpose of obtaining instructions as to the time and place where such records in Barbour and Bullock Counties might be examined.

4. At about 10:30 A.M. the said Archie Grubb returned the phone call and deponent attempted to make arrangements to examine the said voting records on that day, but was advised by Grubb that Respondent George C. Wallace, who had assumed custody and control of the records, was attending court in Union Springs, Alabama.

5. That deponent and the other named representatives of the Commission were, for the reasons described in paragraph 4, unable to make arrangement for examination of the records on that day.

6. That on the following day, January 8, 1959, deponent and Mr. Bernhard traveled to Clayton, Alabama, and were admitted to the chambers of Judge Wallace at about 10:00 A.M.

7. That deponent was advised by Judge Wallace that he regarded our request to examine the records as a judicial proceeding; such request was subject to a test of relevancy, and he requested a written itemization of the records sought; the number and identity of the com-

plainants in Barbour and Bullock Counties; and a showing of relevancy.

8. That deponent and Mr. Bernhard attempted to comply by preparing a list of the records desired together with the names of the complainants from Barbour and Bullock Counties who testified before the Commission on Civil Rights in December 1958 in Montgomery, Alabama.

9. At about 11:45 A.M. on said day said memorandum was delivered to Judge Wallace, who marked it "Filed."

10. That after a short discussion concerning the list Respondent George C. Wallace, Jack Wallace, and Circuit Solicitor Seymour Trammel adjourned to confer.

11. At 1:00 P.M. on said day deponent and Mr. Bernhard returned to the Court House and were told to wait.

12. At about 1:40 P.M. deponent returned to Respondent Wallace's chambers and discussed the matter further.

13. At about 2:25 P.M. Respondent Wallace indicated that he would make available only the records of the complainants who had testified at the Commission hearing.

14. At about 3:15 P.M. Respondent Wallace indicated he would have to determine what records he had in his possession in order to determine if they were relevant.

15. That after further discussion, at about 4:30 P.M. Respondent Wallace called a clerk in Bullock County to request a search for the registration application of one Arron Sellers; he also repeated that registration applications of complainants in Barbour County would be made available.

16. That after much discussion, at about 7:00 P.M. Respondent Wallace, still refusing to produce all the records covered by order of this Court, delivered to deponent and Mr. Bernhard a written statement indicating which few records would be made available.

17. At about 7:15 P.M. deponent and Mr. Bernhard were permitted to examine the following in Barbour County:

(a) A registration book containing the name of one George Morris—listed as registered.

(b) Registration applications of George Morris and Andrew Jones.

18. At about 8:00 P.M. deponent met Jack Wallace, Seymour Trammel, and one other in Union Springs, Alabama, and was only permitted to examine two registration applications of Arron Sellers.

19. That the items referred to in paragraphs 17 and 18 were the only voting records which deponent was permitted to examine.

CHARLES E. CLARK

* * *

Exhibit C

STATE OF ALABAMA)
)
MONTGOMERY COUNTY)

AFFIDAVIT

Berl I. Bernhard, having been duly sworn, deposes and says: That he is an employee of the Commission on Civil Rights and that he has been assigned and is presently serving on a voting study team.

1. That he has read the affidavit of Charles E. Clark and swears on his own personal knowledge that the facts set out therein in paragraphs 6 through 19 are accurate and true and that he herein incorporates by reference the said paragraphs of said affidavit.

s/ BERL I. BERNHARD

* * *

Memorandum Opinion and Order of January 9, 1959

On January 9, the court considered the objections to its order of December 11. The order was dismissed as to certain parties who had complied with earlier orders of the court. Judge Wallace was ordered to make available the subpoenaed records on January 12 and 13:

(The above matter coming on to be heard in open court at Montgomery, Alabama, at two thirty, p.m., on January 9, 1959, before Hon. Frank M. Johnson, Jr., Judge, the following proceedings were had:)

THE COURT: This is the matter of Civil Action 1487-N, styled, in re: George C. Wallace, W. A. Stokes, Sr., Grady Rogers, E. P. Livingston, M. T. Evans, and J. W. Spencer. This is a memorandum order and opinion in this matter, upon the motion filed this date for further relief, filed upon behalf of the Attorney General of the United States by his attorneys, and for the purposes of further specific relief in this cause in accordance with paragraph four of the order entered herein January 5, 1959. The order made and entered in this cause by this court on January 5, 1959, was presented to this court by counsel for the United States, Amicus Curiae counsel appearing at the request of the—and with the permission of this court, at the request of the Alabama Bar Association, and counsel for George C. Wallace, W. A. Stokes, Sr., Grady Rogers, E. P. Livingston, M. T. Evans, and J. W. Spencer; several attorneys appearing and representing at that time George C. Wallace, including John Patterson, Chauncey Sparks, Preston Clayton, Seymour Trammel, and Archie Grubbs.

At the time said order was presented to this court by all of said counsel, this court prior to accepting, signing, and filing said agreed upon order, in response to inquiry by counsel for George C. Wallace, stated to said counsel, who were at that time appearing for and on behalf of George C. Wallace, that, quote, "The words relevant to the Commission's inquiry," end quote, meant the registration and voting records in the custody of the said George C. Wallace. This statement concerning relevancy of said records was accepted by George C. Wallace by and through his counsel whom he elected to appear through without objection, and this court was assured by all concerned that said agreement would be carried out fully and in good faith. Said agreed upon order was executed and filed by this court upon that basis. It now appears that the said George C. Wallace has not and still refuses to carry out the said agreement entered into with this court by the counsel that he elected to appear before this court through, even in the face of, and as this court is advised, the advice by his counsel.

[*Special Finding*]

Now, upon consideration of said motions, including the motion now made by the Attorney General of the United States, for further relief, and upon consideration of the statements made by counsel to the court in chambers, upon consideration of the written briefs filed in support of said motions, and in opposition thereto, this court specifically finds that the Commission on Civil Rights is a temporary agency of the United States Government, created by the Civil Rights Act of 1957, under Public Law 853-15, dated September 9, 1957; that under Section 104 (a) of that Act the Commission is empowered and directed to investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based; to study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution; and, three, appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution.

The Act also empowers the Commission, or any authorized sub-committee thereof to hold such public hearings and act at such times and places as the Commission may deem advisable. Said Act also empowers the Commission to require the attendance and testimony of witnesses or the production of written or other matters. That part of the Act that empowers the Commission, insofar as that is concerned, is Section 105 (f). In case of contumacy or refusal to obey a subpoena issued and caused to be served by

the Commission, the Act confers jurisdiction, quote, "Upon any District Court of the United States within the jurisdiction of which the inquiry is carried on, upon application by the Attorney General of the United States to issue to such person an order requiring such person to appear before the Commission or a sub-committee thereof, there to produce evidence if so ordered or there to give testimony touching the matter under investigation, and any failure to obey such order of the court may be punished by the court as a contempt thereof." Reference is made to Section 105 (g) of the Act. End that quotation. This announcement made on October 23, 1958, set a public hearing to be held in Montgomery on December 8, 1958. It was further announced that said hearing would be to investigate complaints by certain citizens of the United States concerning deprivations of the right to vote by reason of race or color. It was on said date further announced that the voting and registration records of several counties of the State of Alabama would be sought.

[*Investigators' Role*]

On October 21, 1958, two investigators for this Commission sought permission to inspect certain voting and registration records of Macon County, Alabama, and insofar as any comment this court makes concerning the records of Macon County, Alabama, a provision made in the latter part of this order with reference to the voting and registration records in that County will reflect that the Registrars of Macon County, Alabama, that is, Registrars Livingston and Rogers, and those records, are no longer in this case. This request was refused by the Registrars who were then custodians of those records. It was publicly announced that the refusal was upon the advice of the Attorney General for the State of Alabama. Prior to this hearing, by subpoena served December 2, 3, and 4, 1958, the movants, as officials of the State of Alabama—and the movants' official positions are, W. A. Stokes and J. W. Spencer are members of the Board of Registrars of Barbour County, Alabama; M. T. Evans, a member of the Board of Registrars of Bullock County, Alabama; E. P. Livingston and Grady Rogers were members of the Board of Registrars of Macon County, Alabama; and George C. Wallace is Judge of the Third Judicial Circuit of Alabama, comprising Barbour, Bullock, and Dale Counties.

Those officials were ordered to appear on December 8, 1958, before the Commission at Montgomery and to produce certain voting and registration records and give testimony concerning the matters then under investigation. Five appeared before the Commission and refused to give testimony and failed to produce records. Movant Wallace failed to appear. This court did, therefore, upon written verified application, with proper affidavits and documents attached thereto, issue its order of December 11, 1958, an ex parte order.

[*Contention of Movants*]

The movants, with the exception of Livingston and Rogers, who will be dismissed, by the motions now presented and under consideration by this court contend, first, that enforcement of the subpoenas would constitute an illegal invasion of the sovereignty of the State of Alabama; second, that enforcement would violate the principle of comity; three, that enforcement would constitute an improper inquiry into judicial acts of judicial officers; four, that this court is without jurisdiction to enforce compliance with said subpoenas; five, that Alabama law forbids removal of records sought from counties in which they are located, and also the records are too bulky and voluminous to produce, and also the records are privileged and confidential; six, that the movant registrars no longer have custody of these records. A somewhat detailed though combined discussion of these several points is considered necessary and appropriate. The authority delegated to the Federal Government by the Fifteenth Amendment to the Constitution of the United States is undoubtedly the authority under which the Congress of the United States was acting when the Civil Rights Act of 1957 was passed.

The provision in the Act providing for investigation of alleged discriminatory practices, including inspection of voting and other pertinent records, must be considered to be an essential step in the process of enforcing and protecting the right to vote regardless of color, race, religion, or national origin. That part of the Act is therefore by this court considered, quote, "Appropriate legislation," end quote, within the meaning of Section 2 of the Fifteenth Amendment. The sovereignty of the State of Alabama, or of any other of the States, must yield therefore to this expression of the Congress of the

United States, since this expression of Congress, by this Act, was passed in a proper exercise of a power specifically delegated to the Federal Government, and the court cites Ex parte Siebold, 100 U.S. Reports, 371. This is necessarily true even though the States possess concurrent legislative jurisdiction with respect to voting, since the Federal Government, and its law, is supreme in this area.

[Kohl *Case Cited*]

The court cites Kohl against the United States, 91 U.S. 367. The concept of the sovereignty of the States is embodied in the Tenth Amendment to the Constitution of the United States, this Amendment providing that those powers are reserved to the States which have not been, quote, "Delegated to the United States by the Constitution, nor prohibited by it to the States," end quote. Here we have involved the very powers which the Constitution of the United States says are not reserved to the States. See the United States against Reese, 92 U.S. 214; United States against Darby, 312 U.S. 100; and Fernandez against Wiener, 326 U.S. 340. The fact that the State of Alabama voting and registration records are involved in this case does not alter the legal principle at all. Citing in re: Cohen, 62 F.2d 249; United States against Ponder, 238 F.2d 825; Endicott Johnson Corporation against Perkins, 317 U.S. 501.

Thus, it must be generally concluded, and this court now concludes, that since the Congress of the United States did have the authority to pass the Civil Rights Act of 1957, and that said authority is supreme in this field, as opposed to any authority of the States, and since the Commission on Civil Rights was, in issuing the subpoenas in question, acting pursuant to that Act, and since this court was, in issuing its order upon the application of the Attorney General of the United States, also acting pursuant to said Act, the contention that movants make that enforcement of the subpoenas will constitute an illegal invasion of the sovereignty of the State of Alabama, and the contention that this court is without jurisdiction to enforce compliance with said subpoenas are without merit and cannot stand. Question movants raise concerning improper inquiry into judicial acts of the judicial officers must for this particular case be discussed separately as to the movant Wallace, who is a Circuit Judge of the State of Alabama, and the other movants who are registrars of the counties involved. As to Judge Wallace, no appearance and no testimony from him is, by this court, required, since he, as this court understands the matter, is only called upon to respond to a subpoena duces tecum. Any other understanding or any other construction that may be placed upon the Commission's subpoena is, by this court, cancelled. Such a subpoena, a subpoena duces tecum, requires no testimony, only production of records. Such production can be made, if he sees fit, by clerks or agents. Thus, the questions raised by him concerning his schedule and absence from his circuit need no discussion. Concerning the requirement of Wallace to produce these records, it is sufficient to say, and this court now says, that there is no concept of judicial privilege or immunity which relieves him of this requirement.

[*Binding on State Officials*]

Legislation enacted pursuant to the Federal Constitution is binding on all State officials, including the Judges. This question was laid to rest by the Supreme Court of the United States in Ex parte Virginia, 100 U.S. 339, where the court stated, in having reference to actions of the political body dominated a State "by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The Constitutional provisions, therefore, must mean that no agency of the State or of the officers or agents by whom these powers are exerted shall deny to any person within its jurisdiction the equal protection of the law". End quote. And as that is applicable, here, that portion or the pertinent portion of the Fifteenth Amendment previously referred to by this court. Other cases have been equally precise in laying down this principle that State action, in whatever form, will not be permitted to prevent the proper exercise of a proper Federal power, and this court cites the United States against Peters. 5 Cranch 115; Faubus against the United States, 254 F.2d 797; and Sterling against Constantin, 287 U.S. 376.

[*Not a Privilege*]

Thus, this court now concludes that judicial status does not confer a privilege upon Judge Wallace to disregard the positive command of the law, here the Fifteenth Amendment, and

that such status does not give immunity from inquiry which is duly authorized, as this inquiry is. This does not mean to say or imply that a judge is not immune from investigation or inquiry into his judicial acts, he is. For example, this Commission, nor indeed the Congress of the United States, could not inquire of Judge Wallace as to why he impounded these records or what factors he took into consideration when he impounded these records. However, in the case now presented no judicial act or decision of Judge Wallace need be nor is questioned.

It may be, and this court will for the time being, and I emphasize "for the time being," assume that the order impounding the records of Bullock and Barbour Counties were proper and in good faith. The only question presented is the right of the Commission on Civil Rights to see those records. Now, generally, when a direct conflict occurs between State and Federal action in a field such as this field, the States must yield. For the law to be otherwise would render the Supremacy Clause in the Constitution of the United States ineffective, and when I say Supremacy Clause, I am referring to Article VI, clause 2. This principle was laid down early in our law by the Supreme Court of the United States in that now much referred to and well known Tarble's Case, 13 Wallace 397. However, that is the general rule, and a different problem exists where the *res*, that is, the thing, is in the possession of the State court.

The Supreme Court of the United States, in Covell against Heyman, and that citation is 111 U.S. 176, made this clear when they stated, quote, "But between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. They exercise jurisdiction, it is true, within the same territory, but not in the same plane, and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void," and I end that quotation. To the same effect is the Ninth Circuit case of Strand against Schmittroth, 251 Federal 2nd 590. This court notes at this time that the Heyman principle does not apply when the State court has acted in seizing the *res* in bad faith.

[*Intention Important*]

It should be made clear, therefore, that if Judge Wallace impounded these records for the sole purpose of thwarting this investigation, he cannot take refuge in the Heyman principle of comity. In this case it is not necessary for the good faith of Judge Wallace, insofar as impounding these records are concerned, to be inquired into, since this court considers it appropriate to—which it already has by agreement, and which that still stands, that phase of the previous order still stands—considers it appropriate to modify the subpoena of the Commission, and to modify the order of this court dated December 11, 1958, and amended December 17, 1958. This modification will eliminate any proposed seizure and removal of these voting records and will eliminate any possible interference in their *bona fide* use by the State authorities. This power to make such modification, if this court considers it appropriate, even in the absence of agreement, is clear. The court cites the N.L.R.B. against Duval Jewelry Company, Fifth Circuit 1958 case, 257 F.2d 672, and reference is made to cases cited by the Fifth Circuit Court of Appeals in that case. This modification will relieve movants, particularly George C. Wallace, of any obligation to produce the records in Montgomery, and will eliminate the necessity for the records to be moved from their present location. Instead, each of the registrars, specifically, W. A. Stokes, Sr., M. T. Evans, and J. W. Spencer, and George C. Wallace, as Judge and in whatever other capacity he is acting in, will be ordered to make said records available at their present location, which this court understands is at the court house in Barbour County, and if that is not the case then wherever their location is, for copying, inspection, and photographing by the Commission or its duly authorized agents. Thus, the movants' objection to the removal of the records from their present location, and their voluminous aspect, is eliminated from this case.

[*No Basis for Objection*]

Now, it is obvious from what has been stated by this court already in this order that there is no valid basis for the movant registrars' objections to appearing and testifying if this court by later order decides upon a proper application, if such application is made, that they must do so. Any objections that they now make will there-

fore be, and they are hereby, overruled and denied. The question as to the time and place the registrars W. A. Stokes, Sr., M. T. Evans, and J. W. Spencer will be ordered to appear and testify will be reserved for further order, pending the examination of these records in Barbour and Bullock Counties by the Commission or its duly authorized agents. The contention that the registrars are judicial officers has no merit in this action. This court cites Malone against Jones, 219 Alabama 236; Boswell against Bethea, 242 Alabama 292; and Hawkins against Vines, 249 Alabama 165. In the Bethea case, particularly, the Supreme Court of Alabama set forth the proposition that the functions of the registrars are identical with the functions of an administrative agency making quasi-judicial determinations. In any event, regardless of their status under Alabama law, registrars cannot be given any immunity from the exercise of a Federal function such as that involved in this case. To hold otherwise would be to say that the State of Alabama could thwart the Congress of the United States in any field and deprive the Federal Government of its specifically delegated powers, here those delegated specifically by the Fifteenth Amendment to the Constitution, simply by saying that the State officers, such as the registrars, were judicial officers or judges. That cannot be and it is not the law as this court understands it.

[*Order to Wallace*]

This court now orders and directs that George C. Wallace, as the present custodian of the said records, that is, the voting and registration records of Barbour and Bullock County, Alabama, is hereby ordered and directed to make available to the Commission on Civil Rights or its authorized representatives or agents between the hours of ten, a.m., and four, p.m., on January 12 and 13, 1959, at some convenient place to all concerned in the court house at Barbour and or Bullock Counties, Alabama, the records of the Boards of Registrars of Barbour and Bullock Counties, Alabama, pertaining to the registration of all persons heretofore registered as voters, including applications, questionnaires, and other evidence touching upon the qualifications of such persons registered and not registered by the Boards of Registrars of Barbour and Bullock Counties, Alabama. As to Grady Rogers and E. P. Livingston, it appears that these individuals acting individually and through their counsel have in good faith carried out their agreement and complied with the order of this court dated January 5, 1959, and this matter is, therefore, as to them, ordered to be and it is hereby dismissed.

Jurisdiction of this cause is retained for the purpose of any further orders that it may be necessary and appropriate to enter. The representatives of the Commission on Civil Rights, the representatives of the Attorney General of the United States, and the counsel for Wallace, Stokes, Evans, and Spencer are directed to appear before this court at nine thirty, a.m., on January 14, 1959, for the purpose of reporting to this court the progress of the matter, and also for the purpose of presenting any further motions that may be appropriate or required.

All right, gentlemen, is there anything further on behalf of the Attorney General?

MR. RYAN: No, your honor; thank you very much.

THE COURT: Is there anything further on behalf of any of the parties?
(*No response*)

THE COURT: Mr. Henderson, will you type that up, and file it with the Clerk today. Type it up and file it with the Clerk, this date. All right, that will be the order of the court. The court is in recess until further ordered.

Glynn Henderson,
Official Court Reporter.

* * *

Statements by Grand Juries

On January 12 and 13, the grand juries of Barbour and Bullock counties, both of which were in possession of some of the disputed voting records, issued statements in connection with their roles:

BARBOUR COUNTY REPORT

To the Honorable George Wallace:

We the Grand Jury of Barbour County, Alabama empaneled by your honor on the 12th day of January, 1959, render this partial report:

In accordance with the instructions of your honor, we have called before us Honorable Crews Johnston, the complainant who filed the petition, asking that the registration records of Barbour County be impounded and turned over to the grand jury for its consideration. We have examined Mr. Johnston and find there is probable cause for us to examine the records themselves and we have resolved to do so.

We are informed that there are present in Clayton, Ala. today four representatives of the Civil Rights Commission and we are informed that these representatives desire to examine these records which your honor has turned over to us. It is our considered opinion that we should keep these records in our custody until such time as we can complete our investigation. However, we have offered to the four representatives of the Civil Rights Commission a proposal whereby they might examine these records jointly with us in the courtroom of the courthouse in Clayton, Ala. Our proposal was that we would examine the records pertinent to our investigation in one section of the courtroom and as we finished with these records we would turn them over to these four representatives who could examine them in another section of the court room without interference to the grand jury. We have been informed that this proposal was refused by the representatives of the Civil Rights Commission. This offer was made in a spirit of co-operation and in an effort to resolve the controversy which we understand has existed with reference thereto. Had our offer been accepted we would have remained in session for such length of time as might be necessary to enable them to complete their investigation.

Since our offer was refused and since we were called on short notice and this is not a convenient time for many of our members to remain in session, we respectfully ask that your honor recess this grand jury until 10 a.m., Jan. 15, 1959.

Respectfully submitted this Jan. 12, 1959.

s/ Winn E. Martin, Foreman.

* * *

BULLOCK COUNTY REPORT

We, the Grand Jury of Bullock County, Alabama, empaneled by Your Honor, on the 13th day of January, 1959, render this partial report:

In Accordance with the instructions of Your Honor we have called before us J. T. Ogletree, the Complainant who filed the petition asking that the registration records of Bullock County, Alabama, be impounded and turned over to the Grand Jury for its investigation. After this examination we have concluded that there is probable cause for an investigation and we have so resolved to do.

We understand that a representative of the Civil Rights Commission has requested to see records now in our possession concerning voter registrations in Bullock County. The records that have been requested by the Civil Rights Commission are in our possession and custody and it is our intention that they remain there and shall not be removed from our possession by anyone pending the conclusion of our investigation. We feel that a use of the records by representatives of the Civil Rights Commission, in the presence of our Foreman, and another member of the Grand Jury to be selected by our Foreman, will not interfere with our investigation. Therefore, to show our good intentions and the good faith that has been displayed in this matter by all officials of this Circuit and County concerned, we have offered to allow such use by such representatives during the time they are not used by this Grand Jury. We repeat, so long as it is done in the presence of this Body acting through its Foreman and such other member of the Grand Jury as may be selected by him.

We are advised by our Solicitor, who has the same views as you have in this matter, that we are the supreme inquisitorial body of this County and under our system of law we conduct our

investigations without coercion, interference or direction from any source. Since these records are in our custody we say to the Commission: "These records may be used by you by reason of our permission rather than your right. You may see them only under the rules set by us."

We commend your Honor of his long fight to enforce proper respect from all sources for the authority and dignity of the Courts of this State. We feel that the act of the Civil Rights Commission in coming to Bullock County, Alabama, and making a respectful request for use of these records rather than making an arrogant demand is evidence tending to show their new found recognition of State authority, for which Your Honor is to be further commended.

We respectfully request your Honor to recess this Grand Jury until 10:00 o'clock A. M., January 16, 1959.

Respectfully submitted this 13th day of January, 1959.

s/ Roy C. Holmes, Foreman

Hearing of January 14, 1959

On January 14, the United States Attorney General asked the court to allow a delay in its report:

(The above matter coming on to be heard in open court at Montgomery, Alabama, at nine thirty-five, a.m., on January 14, 1959, before Hon. Frank M. Johnson, Jr., Judge, the following proceedings were had:)

THE COURT: Gentlemen, this is Civil Action 1487-N, set this morning by order of this court of January 9 for the purpose of you gentlemen reporting to this court the progress, if any, in this matter, insofar as these records that are involved being made available to the Commission on Civil Rights, or their agents, and also for the purpose of presenting any further motions that may be appropriate and necessary. You have any report to make?

MR. RYAN: Your honor, at this time I should like to orally move that the full and formal report on this matter be deferred for twenty-four hours, for this reason; that pursuant to your honor's order, the agents of the Civil Rights Commission have attempted to contact the respondents who were to deliver the records to them. The two days for such delivery that your honor has set in your order was—were spent in such a way that the first day was consumed in negotiations. Toward the end of the second day the records in one county, Barbour County, were actually made available, and at this time I have been apprised that it seems that the investigation there is sufficient and is complete. As soon as I have the assurance and representation that the Commission's agents are fully satisfied, I intend to file this by way of a formal motion with the court, and also a formal motion as to the substantial compliance of the Registrar Mr. Spencer. That is my information at this time; however, I do not have it formalized, because the agents of the Commission late yesterday, after they were terminating their investigation in Barbour County, after a call by the Director of Compliance, of Complaints, Investigation, and Survey, Colonel Rosenfeld, to Mr. George Wallace, received a call from the Foreman of the Grand Jury in Bullock County, saying the records would be made available to them at their leisure, starting this morning. The agents are currently there. As far as I can determine now, they are going to be examined, if they are not now being examined.

THE COURT: In Bullock County?

MR. RYAN: In Bullock County. In order that I can make an adequate and full report to the court on the amount and character of compliance in both counties, I would request, therefore, that we be given one extra day—

THE COURT: All right.

MR. RYAN:—for the purpose of filing our formal report.

THE COURT: You gentlemen have any objection?

MR. KOHN: No objection.

MR. RINEHART: No objection.

MR. CLAYTON: No.

THE COURT: Then upon a motion of the Attorney General it is ordered that this matter be and it is hereby continued until nine thirty,

January 15, 1959, of course that is tomorrow, at which time the attorneys of record for the Attorney General and for the other parties to this action are directed to again appear before this court for the purpose of reporting to this court the progress of the matter, and also for the purpose of presenting any other motions that may be deemed appropriate or necessary. Now, for the record, it is my understanding that Mr. John P. Kohn, Jr., appears in this matter at this time for George C. Wallace; is that correct?

MR. KOHN: Yes, sir.

THE COURT: All right. Now, so that this court record will accurately reflect the representation of the various parties to this litigation, I have been informed that insofar as the State of Alabama is concerned, and this information is through Mr. Ralph Smith, Special Assistant to the Attorney General, that they are no longer interested in this matter; does the Attorney General, John Patterson, continue to appear for George Wallace?

MR. RINEHART: Your honor, the Attorney General, John Patterson, is no longer appearing for Judge Wallace; however, because your honor has retained jurisdiction with reference to certain registrars, possibly with a view to ordering testimony, we do still appear for them.

THE COURT: All right.

MR. RINEHART: The State of Alabama is still interested in the registrars.

THE COURT: All right. All right, then the record will reflect that John Patterson and the other members of his staff do no longer appear for and represent George C. Wallace in this matter.

MR. RINEHART: That is correct.

THE COURT: But they do continue to represent Stokes, Evans, and Spencer.

MR. RINEHART: That is correct.

THE COURT: All right, sir. Any other changes in representation, gentlemen?

MR. CLAYTON: No, sir; but, your honor, Governor Sparks was unable to come this morning on account of his health; that explains to you, the order directed that he appear.

THE COURT: All right. You continue to represent George C. Wallace?

MR. CLAYTON: At the present time; yes, sir.

THE COURT: All right. Do you continue to represent George C. Wallace?

MR. GRUBB: Yes, sir; I haven't been in touch with him since Sunday night, but we have been in discussion of it, we do for the time being.

THE COURT: All right. I take it that the attorney that appeared amicus curiae on behalf of and at the request of the Alabama Bar Association, and with the permission of this court, is also still in this case; is that correct?

MR. RINEHART: I spoke to Mr. Johnston yesterday, and he is still interested, and he asked that I appear sort of as his agent, so to speak, in this matter.

THE COURT: All right. All right, gentlemen, this matter, then, will be continued as per the order of this court, until nine thirty in the morning, and this court is now in recess until ten o'clock this morning.

District Court Hearing of January 15

On January 15, the U. S. District Court heard a report on the examination of the voting records as ordered January 9. It directed the U.S. Attorney General to file criminal contempt proceedings against Judge Wallace:

(The above matter coming on to be heard in open court at Montgomery, Alabama, at nine thirty-five, a.m., on January 15, 1959, before Hon. Frank M. Johnson, Jr., Judge, the following proceedings were had:)

THE COURT: All right, gentlemen, this is Civil Action 1487-N, set for today by order of this court of January 9, as amended January 14, for the purpose of you gentlemen reporting the progress, if any, in this matter, insofar as the

records of Barbour and Bullock Counties, Alabama, are concerned, being made available to the representatives of the Commission on Civil Rights. You gentlemen have any motions or report to make to the court?

MR. RYAN: Your honor, yesterday the court granted me the additional day in the anticipation that as result of yesterday's activities it might be possible to present to the court a more complete report. I think at this time I have a complete report, I am handing it to the Clerk, concerning the investigation or the inspection of records in Barbour and Bullock Counties, Alabama. Attached to this report of the Attorney General, pursuant to the court's request, is a letter from Colonel A. H. Rosenfeld, the Director of the Office of Complaints, Information, and Survey of the Civil Rights Commission, and also an affidavit, a factual affidavit of Colonel Rosenfeld in his official capacity. The letter attached, which is addressed to W. Wilson White, the Assistant Attorney General in charge of the Civil Rights Division of the Department of Justice, is to the effect that, although the agents were harassed by dilatory tactics and other questionable and rather childish conduct on the part of the persons who were ordered to cooperate and to produce the records, that as a matter of fact this court's order was—the purpose of this court's order was effectuated in that all the records were produced for inspection finally, in jumbled up form, and there was inspection permitted. The limitations in time yesterday allowed a spot check, however, as the Colonel's letter informs the Attorney General, as I am now informing the court, for the purpose of the Commission this spot check seems to be enough to discern the patterns which is the real purpose behind the Commission's investigating in this area. They feel that to further ask this court for additional relief for additional time to inspect these records would, if anything, serve to build up a cumulative case which would just enhance this pattern. For that purpose they do not wish to move this court for any additional time to inspect the records. With—that is in both Barbour and Bullock County. With respect to the registrars, whom this court retained jurisdiction over for the purpose of compelling testimony should testimony prove to be necessary if the record information was not sufficient, I am informed, and the letter from the Director of the Office of Complaints, Investigation, and Survey reveals, that at each County registrars made themselves available and did cooperate to the extent of asking questions which were put to them.

THE COURT: You mean answering questions?

MR. RYAN: Answering questions which were put to them, your honor. The Commission, through its agents, feel that it would be no useful purpose served by compelling them to testify just for the sake of testimony, in that the information sought to be elicited has been elicited from the registrars. It is therefore the Attorney General's motion in respect to this civil action, which was concerned with the production of records and the obtaining of testimony, that it seems that de facto the purpose and intent of the court's order has been carried out. As to how it has been carried out might be another—another question, but actually the purpose of obtaining information and the records, the purpose of this court's order, was de facto carried out, and for that reason there seems to be no bar to the Attorney General at this time saying to the court that, insofar as any further relief by way of production of records, or by way of the compelling of testimony by registrars would be asked, we do not ask it, and therefore, in the Attorney General's opinion, the matter, the civil matter, so far as production of records and compelling of testimony is concerned, may well be dismissed by this court, and we would so move.

THE COURT: Have copies of your motion been served and made available to opposing counsel?

MR. RYAN: Copies of my motion have been made available immediately prior to this hearing to counsel for the opposing parties.

THE COURT: All right. Any objection to the motion on the part of George Wallace?

MR. KOHN: Your honor, I have been asked to state to the court Judge Wallace's position in this matter—

THE COURT: I am not interested in his position; do you have any objection to this motion? I am not interested in his position—

MR. KOHN: Yes, sir; we have no objection to the motion.

THE COURT: —at this time. All right. I am not interested in his position at this time.

MR. CLAYTON: Yes, sir.

THE COURT: Any objection as far as the registrars are concerned?

MR. RINEHART: No.

THE COURT: I am going to give him an opportunity to explain his position later on.

MR. KOHN: Yes, sir.

THE COURT: All right. Mr. Clerk, you file this report and motion of the Attorney General.

THE CLERK: Yes, sir.

THE COURT: In this cause, Civil Action 1487-N, this court now makes and enters the following order to that motion: This cause is now submitted upon the report and motion made and filed this date by the Attorney General of the United States, said motion and report made pursuant to the order of this court of January 9, 1959; said report and motion reciting, among other things that the registration and voting records of Barbour and Bullock Counties, Alabama, which records were heretofore sought by the Commission on Civil Rights, have been made available to the agents of said Commission and that the Commission on Civil Rights advises this court, through the Attorney General of the United States, that no additional relief is sought of this court with reference to the production of records previously held by George C. Wallace, and this court being further advised that because of the cooperation given and the explanations made by certain of the registrars in these Counties, no further testimony is sought by said Commission on Civil Rights from W. A. Stokes, Sr., M. T. Evans, and J. W. Spencer. This court notes from this report, and from this motion, that the respondent George C. Wallace possibly failed and refused to technically comply with the order of this court, and, as this court is advised by the Attorney General of the United States, "although dilatory tactics and formal refusals were engaged in by respondent Wallace, this court's order was, in fact, if not technically substantially complied with by the devious method employed by respondent Wallace." Now, the attorneys appearing in this cause as representatives of the Attorney General, you, Mr. Ryan, and you, Mr. Owen, are directed to institute criminal contempt proceedings against George C. Wallace by filing with this court as early as possible a formal and appropriate complaint.

MR. RYAN: Yes, sir.

THE COURT: Now, upon consideration of the motion and report made and filed by the Attorney General of the United States, and upon consideration of the affidavit of the representative of the Commission on Civil Rights, together with said representative's letter, a copy of which is attached to said motion, this letter being addressed to the United States Department of Justice, it is the order, judgment, and decree of this court that this cause be, that is, Civil Action 1487-N, and it is hereby dismissed. All right, gentlemen, this court will be in recess until ten o'clock.

* * *

Petition of January 15, 1959

Later on January 15, the U.S. Attorney General petitioned the court for an order to institute prosecution for criminal contempt.

Comes now the United States by its attorneys and pursuant to the request of this Court files this petition for the issuance of an order instituting prosecution for criminal contempt against George C. Wallace and in support thereof alleges the following:

1. That this Court on January 9th, 1959, entered an order in Civil Action 1487-N, a matter which was at that time pending before this Court. Said order, a copy of which is attached hereto as Exhibit "A" and herein incorporated by reference, required and directed one George C. Wallace, a respondent in Civil Action 1487-N to make available for inspection by the Commission on Civil Rights, its agents or representatives, certain voting and registration records of Barbour and Bullock Counties, Alabama. Said inspection was to be made on January 12th, and January 13th, 1959, during the hours from 10 o'clock A.M. to 4 o'clock P.M.

2. That said George C. Wallace received legal notice of the said order through his own counsel

and by virtue of service of a copy of same on him by the United States Marshal for this district.

3. That as more fully appears from the affidavit of A. H. Rosenfeld, Director, Office of Complaints, Information and Survey, Commission on Civil Rights, which is attached hereto as Exhibit "B" and herein incorporated by reference, agents of the Commission on Civil Rights presented themselves to George C. Wallace on the days specified in the Court's order mentioned in paragraph one above, during the times specified in said order and at the places specified by such order.

4. That George C. Wallace in spite of the repeated and proper demands of the authorized agents of the Commission on Civil Rights did wilfully refuse to comply with the order of this court, by refusing to make available the named voting and registration records to said agents for inspection in the manner prescribed by this court's decree.

5. That with respect to the records of Barbour County, Alabama, George C. Wallace, at or about 11 o'clock A.M. on January 12th, 1959, after refusing to make said records available for inspection as called for by this Court's order, did deliberately, wilfully and in violation of the Order of January 9th, 1959, deliver the records to a Grand Jury of Barbour County which he, George C. Wallace, had called into session after this Court's order of January 9th mentioned above.

6. That with respect to the records of Bullock County, Alabama, George C. Wallace, at or about 10 o'clock A.M. on January 13th, 1959, after refusing to make said records available for inspection as called for by the Court's order of January 9th, 1959, did deliberately, wilfully and in violation of said order, deliver said records over to a Grand Jury of Bullock County which he, George C. Wallace had personally called into session subsequent to this Court's order of January 9th.

7. That the actions of George C. Wallace in persistently refusing to make the described records available for inspection in accordance with this Court's order in spite of repeated demands of the agents of the Commission on Civil Rights, and the actions of George C. Wallace in delivering the described records to the Grand Juries of Barbour and Bullock Counties, Alabama, which he had hastily called into session after the Court's order of January 9th, 1959, constitute a disobedience and a defiance of this Court amounting to criminal contempt of this court.

WHEREFORE, the United States of America petitions this Court to:

Institute prosecution and issue an order to show cause why the said George C. Wallace should not be adjudged in criminal contempt;

Cause a copy of said order to show cause to be served upon the said George C. Wallace by the United States Marshal;

Adjudge and hold the said George C. Wallace to be in criminal contempt of this Court.

Respectfully submitted:

Joseph M. F. Ryan, Jr.
Robert Owen
Attorneys, Department of Justice

Exhibit B

STATE OF ALABAMA)
)
MONTGOMERY COUNTY)

AFFIDAVIT

I, A. H. Rosenfeld, of full age, having been duly sworn according to law, upon my oath depose and say:

1. That I am a duly authorized representative of the Commission on Civil Rights holding the position as Director, Office of Complaints, Investigation and Survey and that in that capacity I make this affidavit.

2. That on Monday, January 12, 1959, I proceeded to the County Courthouse of Barbour County in Clayton, Alabama, with three other duly authorized representatives of the Commission on Civil Rights for the purpose of inspecting the registration and voting records of Barbour County pursuant to the order of this Court herein dated January 9th, 1959.

3. That we arrived in Clayton at approximately 10 o'clock A.M. on said day and went directly to the office of Circuit Judge George C. Wallace a respondent in Civil Action No. 1487-N, who was not there at that time but arrived shortly thereafter.

4. That in the presence of two members of my staff, Charles E. Clark and Berl I. Bernhard, and in the presence of various officials of Barbour County, I formally requested the registration and voting records of Barbour County under the provisions of the above mentioned order of this Court.

5. That George C. Wallace then and there refused my request and subsequently at approximately 11 o'clock A.M. Wallace went to the court room and placed the aforementioned records in the custody of the grand jury which had been called that morning.

6. That at approximately 11:15 o'clock A.M. Wallace reappeared in his office at which time I again made formal request for said records. In response to my request Wallace advised me that he no longer had custody, but had placed the records in the hands of the grand jury for a special investigation and I was further advised that the grand jury would probably let me see the records in a short period of time.

7. That at approximately 1 o'clock P.M. I again approached Judge Wallace and formally requested the records at which time I received the same negative answer.

8. That some time later I was advised that the records could be inspected in the presence of the grand jury but I refused to agree to such arrangement and shortly thereafter the grand jury adjourned until January 15, 1959.

9. That at approximately 4 o'clock P.M. on January 12, 1959, I again approached Wallace and requested the registration and voting records of Bullock County, Alabama.

10. That Wallace advised me that he was going to charge a special grand jury in Union Springs, Alabama, the next morning and would place said records in the custody of that body in a fashion similiar to the action he had taken in Barbour County.

11. That I thereupon advised Wallace such arrangement would not be satisfactory, but that if he could arrange to let us see the records in the presence of a court official, the registrars and the foreman of the grand jury we would be willing to look at them.

12. That on Monday night, January 12, 1959, Judge Wallace telephoned me and advised me that if I could send two of my agents to Barbour County and the remainder to Bullock County the next morning, he believed we could see the records.

13. That relying on the above mentioned representations of the Respondent Wallace, my entire group proceeded to Union Springs, Alabama, on Tuesday morning, January 13, 1959. I was prepared to send two agents of my group to Clayton if we were assured we could see the records of Barbour County there.

14. That at approximately 9:50 o'clock A.M. on January 13, 1959, I approached Wallace in the Court House in Union Springs, Alabama, prior to the time he charged the grand jury and at which time I once again formally requested the Bullock County records.

15. That Wallace refused my request but instead proceeded to place the records in the custody of the Bullock County grand jury.

16. That at approximately 11:00 A.M., Tuesday, January 13, 1959, in the Court House in Union Springs, Alabama, Wallace advised me to send my men to Clayton, Alabama.

17. That having been unable to obtain access to and to make an inspection of the records at Union Springs my entire group proceeded to Clayton where the County Solicitor advised me that the Barbour County Grand Jury had met and invited us to inspect the records in the presence of the foreman, the County Solicitor and a registrar requested by me.

18. That an inspection of the records was therefore commenced at 12:45 P.M. and concluded at 4:45 P.M.

19. That at approximately 3 o'clock P.M. on January 13, 1959, Wallace talked to me on the telephone from Union Springs, Alabama, and advised me to the effect that I might see the Bullock County records if I called the grand jury.

20. That I refused to do this on the grounds that I was acting under the order of this Court which required Respondent Wallace to see that the records were made available.

21. That Respondent Wallace then advised me that he had nothing more to say, however, shortly thereafter at approximately 4:10 P.M. January 13, 1959, I received a telephone call from one Mr. Holmes who identified himself

as foreman of the Bullock County Grand Jury, who advised that I could see the records under conditions similiar to those in Barbour County.

A. H. Rosenfeld, Jr.

ORDER

The United States by its attorneys has heretofore filed a petition with supporting affidavit for the prosecution by the Court of George C. Wallace for criminal contempt and in support of the petition has alleged that the said George C. Wallace wilfully violated the order of this Court in Civil Action No. 1487-N entered on January 9, 1959.

In support of said petition, petitioner alleges that representatives of the Commission on Civil Rights, pursuant to the said order of this Court, presented themselves at the County Court House of Barbour County, Alabama, at or about ten A.M., on January 12, 1959, and requested from George C. Wallace access to the voting and registration records in conformity with said order and there remained and continued said request throughout that day. Said records were not made available, but instead were turned over to the Barbour County grand jury by the said George C. Wallace. Petitioner further alleges that on or about 10 o'clock A.M., on January 13, 1959, that the said representatives of the Commission on Civil Rights communicated with George C. Wallace at the County Court House of Bullock County, Alabama, and requested that he give them access to the records subject to said order, but the said George C. Wallace refused to allow the representatives to see said records but instead George C. Wallace turned over said records, in direct violation of the said order of this Court, to the Bullock County Grand Jury.

It appearing to this Court that good cause has been shown why George C. Wallace should be prosecuted for criminal contempt of this Court it is,

ORDERED, ADJUDGED and DECREED that George C. Wallace of Clayton, Alabama, appear before this Court at Montgomery, Alabama, on the 26th day of January, 1959, at 10:00 A.M., and show cause, if any there be, why he should not be found guilty of criminal contempt of this Court by reason of his disobedience of the order of this Court in Civil Action No. 1487-N entered January 9, 1959, and be punished for said criminal contempt, and it is

Further ORDERED that Joseph M. F. Ryan, Jr., and Robert Owen, be and are, hereby appointed to represent this Court in the instant matter to prosecute on behalf of this Court the said defendant for criminal contempt of this Court.

It is further ORDERED that a copy of this order with the petition and exhibits attached be served on George C. Wallace by the United States Marshal for this District.

DONE this 15th day of January, 1959.

s/ Frank M. Johnson, Jr.
United States District Judge

Order and Judgment of Acquittal

On January 26, the U.S. District Court found that Judge Wallace had not acted so as to be guilty of defiance or disobedience of the court's order, and acquitted him on the charge of criminal contempt.

ORDER AND JUDGMENT OF ACQUITTAL

Upon consideration of the pleadings and testimony taken herein, and the pleadings and affidavits submitted in civil action 1487-N, styled In re: George C. Wallace, et al., the following order and judgment is now made and entered.

This Court on the 9th day of January, 1959, entered an order in civil action 1487-N, a matter which was at that time pending before this Court; said order required and directed the defendant in this present cause—George C. Wallace—who was a respondent in that numbered civil action, to make available for inspection by the Commission on Civil Rights, its agents or representatives, certain voting and registration records of Barbour and Bullock Counties, Alabama.

This Court finds that on January 12 and 13, 1959, George C. Wallace, after receiving actual

notice of this Court's order, for some reason judicially unknown to this Court, attempted to give the impression that he was defying this Court's order by turning said records over to hastily summoned grand juries in Barbour and Bullock Counties, Alabama. However, this Court finds that said action did not constitute defiance or disobedience, since Wallace, from all appearances, continued to maintain control of said records in each of said counties.

This Court further finds and concludes that George C. Wallace, through devious methods, assisted said agents in obtaining the records in these two counties. Specifically, he assisted by:

(1) furnishing certain of the voting and registration records to the agents of the Commission on Civil Rights in his office in Clayton, Alabama, at 7:15 p.m., on January 8, 1959;

(2) contacting the agents on the night of Monday, January 12, 1959, and at that time advising them that the Barbour County records would be available in Clayton, Alabama, on January 13, 1959. The agents, acting upon this information, proceeded to Barbour County where they obtained the records as Wallace had advised they would; and

(3) informing the agents at approximately 3 p.m. on January 13, 1959, that the Bullock County records might also be made available in the same manner that the Barbour County records had been made available. These records in Bullock County were all later made available to representatives of the Commission.

This Court further finds that, even though it was accomplished through means of subterfuge, George C. Wallace did comply with the order of this Court concerning the production of the records in question. As to why the devious methods were used, this Court will not now judicially determine. In this connection, this Court feels it sufficient to observe that if these devious means were in good faith considered by Wallace to be essential to the proper exercise of his state judicial functions, then this Court will not and should not comment upon these methods. However, if these devious means were for political purposes, then this Court refuses to allow its authority and dignity to be bent or swayed by such politically-generated whirlwinds.

The defendant, George C. Wallace, is ORDERED to be and he is hereby found not guilty of contempt of this Court and stands discharged.

Done, this the 26th day of January, 1959.

Frank M. Johnson, Jr.
United States District Judge

Bullock County Grand Jury Report

On January 28, two days after the acquittal order in the criminal contempt case, the Grand Jury of Bullock County restated its relationship with Judge Wallace:

* * *

This Grand Jury was called into session on January 13, 1959, by the Honorable George C. Wallace, and the voter registration records of this County were at that time turned over to this Grand Jury for an investigation of irregularities in attempted registrations.

We have made an investigation of this matter and we feel that a further investigation should be made. Due to the fact that the term of this Grand Jury will soon expire, we recommend that the matter be placed before the next grand jury to be impaneled for this County.

On January 13, 1959, this Grand Jury made an offer to Agents of the Civil Rights Commission whereby said agents would be able to examine the voter registration records of this County in the presence of our Foreman and another member of the Grand Jury to be selected by said Foreman, to insure that the same would not be tampered with by such Agents. An inspection was made by agents of the Civil Rights Commission on January 14, 1959, in accordance with our offer.

We have read the order of the Federal District Court in a recent action involving our former Judge, George C. Wallace, and we resent the charge contained in such order against this Grand Jury. We, as well as all other grand juries of the State of Alabama, are the supreme inquisitorial bodies of our respective counties and are independent bodies free from the influence of anyone or anything except the dictates of our own conscience and the laws of the State of Alabama.

Judge Wallace did not make any request of

this Body or try to influence our actions in regards to our use of any documents in our possession. Our desire to show the world that we in Bullock County, Alabama, had nothing to hide prompted our actions in this regard and, we repeat, we resent any accusations or insinuations to the contrary from any source.

Respectfully submitted this the 28th day of January, 1959.

s/ C. M. Bristow,
Foreman

EMPLOYMENT
Labor Unions—Federal Statutes

Bennie L. WHITFIELD et al. v. UNITED STEELWORKERS OF AMERICA, LOCAL NO. 2708, et al.

United States Court of Appeals, Fifth Circuit, January 30, 1959, No. 17290.

SUMMARY: Negro members of an integrated local of the United Steelworkers in Houston, Texas, brought a class action in federal district court against the local and its officers and the employer, for a declaratory judgment, an injunction, and damages. Plaintiffs contended that an agreement entered into by the local and the employer discriminated against Negro employees through the use of two "lines of progression" in promotion policies. The court denied relief, finding that Negroes participated freely in union affairs and that the promotion policies reflected reasonable industry practices and were not discriminatory in themselves nor applied in a discriminatory manner. 156 F.Supp. 430, 3 Race Rel. L. Rep. 55 (S.D. Texas 1957). The Court of Appeals for the Fifth Circuit affirmed, emphasizing the good faith attempt of the negotiators to balance the interests of industry and white incumbent employees in the skilled line of progression (line one) in position and seniority ranks that had accumulated under discriminatory practices of the past, with the interests of Negroes in the unskilled line of progression (line two) now aspiring to line one jobs. A qualification test now required of the latter, but not previously required of white applicants who had been subjected to screening and probationary requirements instead, and a requirement that a person entering line one from line two start at the bottom line one job, even though Negroes so doing would take a wage cut, were upheld because based on skills—a business necessity—and not on racial discrimination. The court called this plan an "honest attempt to solve a difficult problem" for which it would not substitute its judgment, when the result was a contract free, "from now on," of racial discrimination.

Before HUTCHESON, Chief Judge, and RIVES and WISDOM, Circuit Judges.

WISDOM, Circuit Judge.

Five negro members of an integrated union assert that their union, under the guise of equalizing job opportunities at their employer's plant, negotiated a collective bargaining agreement that subtly but effectively discriminates against negro employees.

Plaintiffs-appellants work at the Houston steel plant of the Sheffield Division of Armco Steel Corporation. They are members of Local 2708, United Steelworkers of America, AFL-CIO, the certified exclusive bargaining agent for production and maintenance workers at the plant. The plaintiffs brought a class action against the Union and the Company attacking the validity of a collective bargaining agreement dated May 31, 1956, and seeking an injunction, a declaratory judgement, and damages. The case was tried to the court without a jury. After a lengthy trial and after findings and an opinion that reflects careful consideration of all the facts, the able district judge held that the contract was fair and free from racial discrimination. We affirm.

[*Steele Case Cited*]

The complaint is based on the principle that a certified bargaining agent is under a duty to represent all employees fairly. Steele v. Louisville & Nashville R. R. Co., 1944, 323 U. S. 192, 65 S.Ct. 226, 89 L.Ed. 173.[1] The Union and Sheffield do not take issue with the theory on which the case is brought. Their position is that the contract is fair and nondiscriminatory. In the Steele case the Supreme Court stated:

> "[The duty imposed on the bargaining representative] does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects upon some members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representative of a craft, all of whose members are not identical in their interest or merit."

Thus, the provisions of the collective bargaining agreement must be *relevant* to the conditions of the particular industry and company to which they are to be applied. An agreement will be judicially condemned only in the case of "discriminations not based on such relevant differences. [D]iscriminations based on race alone are obviously irrelevant and invidious."

The question before the Court is whether the May 31 contract is fair, not only to the five negro plaintiffs, but to all Sheffield employees. If there are distinctions between the treatment of negro employees and the treatment of white employees, do such distinctions have their basis in relevant and reasonable differences or are the distinctions invidious discriminations based on race? What is fair is a moral decision resting on the conscience of the Court. To reach a just decision, it is necessary to examine and weigh the facts that produced the May 31 contract.

1. See also Hughes Tool Company v. NLRB, 5 Cir., 1945, 147 F.2d 169; Tunstall v. Railroad Terminal, 1944, 323 U.S. 21, 65 S.Ct. 235, 89 L.Ed. 187; Huffman v. Ford Motor Co., 1953, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048; Syres v. Oilworkers International Union, Local No. 23 et al., 1955, 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 785

BACKGROUND

The steel mill started operations in 1942. Since that time the Union has been the exclusive bargaining agent for production and maintenance workers. Almost without exception, all negroes employed at the mill belong to the Union. This membership is voluntary, since Texas laws prohibit union shops. Of approximately 3000 employees in the bargaining unit, 1700 are white and 1300 are negro employees. The Union has always been integrated. Negro members hold office in the Union, particularly the key office of Plant Grievance Chairman, and have always participated actively and responsibly in all features of the collective bargaining process.

When the Company commenced steelmaking in 1942 it employed white persons for skilled jobs and negroes for unskilled jobs, in accordance with local custom but chiefly because the only available skilled workers were white. From 1942 through 1946, by government regulation, the Company hired employees only through the United States Employment Service.

Collective bargaining contracts between the Union and the Company are master contracts covering the operations of steel plants throughout the country. These contracts, which are common in the steel industry, provided that at each local plant seniority units, lines of progression, would be established within a department.

For purposes of seniority, the Houston plant, like other steel mills in the country, is divided into departments. In accordance with the master contract, each department is divided into two lines of progression, each line constituting a seniority unit. Each line of progression encompasses a distinct operation and is composed of a series of interrelated jobs. The jobs start with the easiest in terms of skill, experience, and potential ability and progress step by step to the top job in the line. The knowledge acquired in a preceding job is necessary for the efficient handling of the next job in the progression.[2] Throughout the years, the skilled jobs within a department were grouped together in logical sequence and called the Number 1 Line of Progression. The unskilled jobs were also

2. The district court found:
"Accordingly, no employee of any race has been allowed to bid into any Line of Progression at any point above the bottom job, and no employee of any race has been allowed to be promoted out of line of his seniority in that particular Line of Progression."

logically grouped together and called the Number 2 Line of Progression. Until the 1956 contract, the Number 1 lines were staffed by white employees and the Number 2 lines by negro employees.

Before the 1956 Agreement, those who applied for jobs in a Number 1 line were closely screened. Even after Sheffield was satisfied that an applicant possessed the qualities needed to progress in the line, he was subjected to a probationary period of two hundred and sixty hours. Any employee who failed to meet with the Company's approval could be discharged at the will of the Company during that period.

As to the Number 2 lines, from 1949 to 1956 all negroes started in the labor pool, or labor department. From the labor pool they bid into the starting jobs in the Number 2 lines. When laid off, a negro employee went back to the labor pool instead of losing a job altogether. Only negroes were hired into the labor pool.

In November, 1954, the first complaints of racial discrimination were made. Some negro employees were dissatisfied with the fact that they could not bid on jobs in the Number 1 lines of progression. As a result of the grievances, negotiations were commenced immediately between the Union and Sheffield. Negotiations were conducted between Company representatives and a Joint Seniority Committee composed of two negro and two white members of the Union. One of the two negro representatives was the Plant Grievance Chairman. In negotiations that lasted for almost a year the Union and Company representatives explored extensively a sound and fair basis for permitting negro employees to enter Number 1 lines of progression. The result of the negotiations was the agreement of May 31, 1956.[3]

THE MAY 31, 1956 AGREEMENT

The agreement made substantial changes in the Company's employment practices. Each bottom job in a Number 1 line was changed from a starting job, subject to the Company's uncontrolled screening, to a bid job. In doing this the Company had to give up its right of original selection. Under the agreement, no pool of white employees can be maintained to fill vacancies in a Number 1 line. Employees in Number 2 lines, negroes, are given preferential rights to fill vacancies in Number 1 lines. Any vacancy in a Number 1 line must now be filled by offering the job first to the bid of an employee in a Number 2 line in the same department, provided the employee first passes a qualifying test. If there is no employee in a Number 2 line in the same department who has passed the qualifying test, then a man in the labor pool who has passed the test may bid for the job. Both whites and negroes now must start in the labor pool. The Company relinquished all screening rights and terminated the 260 hour probationary period. A qualification test takes the place of rigid screening.[4] Once an employee passes the test, he is subject to no more investigation or screening. If he bids from a Number 2 line to a Number 1 line, he is entitled to fill the vacancy, if he has passed the test. The test is given to all employees who enter starting jobs in a Number 1 line, whether they are white or negro. Thus, under the agreement, openings in starting jobs in a Number 2 line are filled from the labor pool. Openings in

3. The two negro members of the Union Committee opposed the agreement. At the ratification meetings, the Union membership as a whole ratified the agreement 1412 to 202. Some 900 negroes attended the meetings but most of them declined to vote yes or no. Those negroes who voted cast approximately 200 to 14 against.

4. The district court found:
"During the negotiations for the May 31st, 1956, Agreement, the Union bargained for and obtained substantial concessions from the Company concerning the uniformity and fairness of the Company test, and provided adequate machinery to check the examination results, thereby assuring all employees equal and fair treatment.

"The examinations accepted by the Company and administered to the employees are tests in wide commercial usage, and are scientifically designed to reveal the potentiality of the employee to promote to the highest skilled jobs in the plant. The examinations are a fair and reasonable substitution of the Company's right to an original selection. No question was raised at the trial in regard to the fairness with which the tests were administered. The record reveals that approximately 90 negro employees have passed the examinations and approximately 45 have moved into the bottom jobs of a No. 1 Line of Progression. The other 45 constitute a reservoir of qualified employees to move into the No. 1 Line of Progression as and when the bottom jobs open. This number has qualified themselves in spite of the fact that most of the negro employees in the plant have declined the invitation to take the examination. Several negro witnesses at the trial testified that they declined to take the examination as a matter of principle or for personal reasons, and there is a substantial evidence in the record from which the court concludes that there has been voluntary refusal to take the examination on the part of most of the negro employees, apparently in reliance upon this litigation as a means by which such requirement will be dispensed with."

starting jobs in a Number 1 line are filled first from the Number 2 line in the same department, then from the labor pool if there are no qualified Number 2 line employees. If there is racial discrimination under the new contract, it is discrimination in favor of negroes.

The appellants complain that the agreement preserves the old inequalities. (1) They object to the qualification test for Number 1 lines. The effect is to require all negro applicants to take the tests since on May 31, 1956, all employed negroes were in the Number 2 lines. (2) They object to the fact that one who bids into a Number 1 line from a Number 2 line must start at the bottom job. This will mean a wage cut in a case where the negro is up the ladder in a Number 2 line.

THE REQUIREMENT OF A QUALIFICATION TEST

The appellants complain that they are discriminated against because the incumbents in a Number 1 line are not required to take the test to remain within the line or to be promoted. The incumbents, however, have already been screened and then subjected to two hundred and sixty hours of probation in which they had to prove their merit or be discharged. The tests seems to be a reasonable substitute for these requirements which the Company relinquished in the May 31 contract. Excluding incumbents from the tests is based not on race but on their having already successfully passed screening and probation, at least equal to the tests. It is true that because negro employees in the past were only in Number 2 lines such negroes are treated differently from white incumbents. But fairness is not achieved by treating the white incumbents unfairly. Efficiency is not achieved by giving negro applicants for Number 1 lines job advantages unrelated to their qualifications. It seems to us that the Company and the Union went about as far as they could go in giving negroes a preference in filling Number 1 line vacancies, consistent with being fair to incumbents and consistent with efficient management.

The district court held that the test requirement is the "minimum assurance" the Company could have of efficient operations, and that it was not a discriminatory requirement. We agree.

THE REQUIREMENT THAT AN EMPLOYEE ENTER A NUMBER 1 LINE AT THE BOTTOM OR STARTING JOB

The May 31 agreement eliminated racially separate lines of progression and opened all lines to all races. The Number 1 lines, however, remain a group of interrelated skilled jobs within a department. Jobs in a Number 1 line do not overlap jobs in a Number 2 line. Thus, an employee must start at the bottom in order to work his way up the Number 1 line. Such a system was conceived out of business necessity, not out of racial discrimination. An employee without the proper training and with no proof of potential ability to rise higher, cannot expect to start in the middle of the ladder, regardless of plant seniority. It would be unfair to the skilled, experienced, and deserving employee to give a top or middle job to an unqualified employee. It would also destroy the whole system of lines of progression, to the detriment of efficient management and to the disadvantage of negro as well as white employees having a stake in orderly promotion.

If a negro in a top job in a Number 2 line wishes to enter a Number 1 line, he must start at the bottom. A lower salary to him, however, is not discrimination on the ground of race; the pay depends on the job and is the same for whites and negroes. He takes his chances on promotion and higher pay later in Number 1 line jobs. Certainly he is not entitled to receive more than others in the same job having the same qualifications. Finally, even if a negro were dissuaded from bidding into a Number 1 line because it would mean a pay cut, the vacancy would then be open to another negro.

[Steele *Distinguished*]

In Steele v. Louisville & Nashville R.R. Co., 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173, union discrimination was obvious. The complainant proved that the union was trying to eliminate negroes from service as firemen under the Railway Labor Act. White employees of inferior competence had replaced the negro employees, although they were both equal in seniority. Only a white person could be assigned to a new job. Each seniority district was allowed only a small percentage of negroes. The record in that case bore out an "ugly example of economic cruelty." We have the exact opposite situation before us. The May 31 agreement

makes available to the negro employees at Sheffield new jobs, higher pay, and it equalizes job opportunities for starting jobs after May 31, 1956. Whatever dissatisfaction the agreement brings to the appellants, as Line Number 2 incumbents, it cannot be blamed on racial discrimination in the existing agreement.

Although the Steele case specifically involved the Railway Labor Act, its principles apply with equal vigor to cases arising under the National Labor Relations Act. Syres v. Oil Workers International Union, 1955, 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 785, reversing, 5 Cir., 1955, 223 F.2d 739; Ford Motor Co. v. Huffman, 1953, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048. A union has a wide range of discretion under the Act, as long as it acts in good faith in the exercise of its discretion. In the Ford Motor case the question was whether the union, in a collective bargaining agreement with Ford, discriminated against veterans because of the system of determining seniority rights established in the agreement. The Supreme Court held that although the seniority rights of some veterans would be prejudiced, the union did not exceed its authority under the Act. The Court made the following observation:

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. *The complete satisfaction of all who are represented is hardly to be expected.* A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

We think that Sheffield and the Union have acted well within the standards discussed in the Steele, Syres, and Ford Motor cases.

The problem before us is not unique. It is bound to come up every time a large company substitutes a program of equal job opportunity for previous discriminatory practices. In such case it is impossible to place negro incumbents holding certain jobs, especially unskilled jobs, on an absolutely equal footing with white incumbents in skilled jobs. In this situation time and tolerance, patience and forbearance, compromise and accommodation are needed in solving a problem rooted deeply in custom.

[*Good Faith Emphasized*]

We attach particular importance to the good faith of the parties in working toward a fair solution. It seems to us that the Union and the Company, with candor and honesty, acknowledged that in the past negroes were treated unfairly in not having an opportunity to qualify for skilled jobs. They balanced the interests of negroes starting Line 1 jobs against the interests of employees who have worked previously in Line 1 jobs, in the light of fairness and efficient operation. After many months of negotiations, and having in mind their duty to all the employees and the need for proper management, they came up with the May 31 agreement, an honest attempt to solve difficult problem. Courts, when called upon to eye such agreements, should not be quick to "substitute their judgment for that of the bargaining agency on the reasonableness of the modifications." Pellicer v. Brotherhood of Railway and Steamship Clerks, 5 Cir., 1954, 217 F.2d 205. The Union and the Company made a fresh start for the future. We might not agree with every provision, but they have a contract that from now on is free from any discrimination based on race. Angels could do no more.

It is undeniable that negroes in Line Number 2, ambitious to advance themselves to skilled jobs, are at disadvantage compared with white incumbents in Line Number 1. This is a product of the past. We cannot turn back the clock. Unfair treatment to their detriment in the past gives the plaintiffs no claim now to be paid back by unfair treatment in their favor. We have to decide this case on the contract before us and its fairness to all.

Considering the contract from the standpoint of all the employees and recognizing the necessity for reasonable standards of operating efficiency, we find that there is no evidence of unfairness or discrimination on the ground of race.

The judgment is

AFFIRMED.

FAMILY RELATIONS
Miscegenation—Mississippi

Daisey RATCLIFF v. STATE of Mississippi.

Supreme Court of Mississippi, December 15, 1958, 107 So.2d 728.

SUMMARY: After a Negro woman had been acquitted of the misdemeanor charge of violating the Mississippi statute against adultery and fornication, she was indicted, tried, and convicted in circuit court, on the same fact allegations, of cohabiting with a white man. The conviction was obtained under a statute reading: "Persons being within the degrees within which marriages are declared by law to be incestuous and void, or persons whose marriage is prohibited by law by reason or [sic] race or blood and which marriage is declared to be incestuous and void, who shall cohabit, or live together as husband and wife, or be guilty of a single act of adultery or fornication, upon conviction shall be punished by imprisonment in the penitentiary for a term not exceeding ten (10) years." Defendant's indictment did not charge that she and the white man were persons "within the degrees within which marriages are declared by law to be incestuous and void," but that they were of different races so that their marriage would be "incestuous and void." The Supreme Court of Mississippi, noting that defendant's plea of former jeopardy because of former acquittal in the misdemeanor case would not be effective if she were properly charged now with a felony, reversed the felony conviction and discharged defendant because the statute under which she was indicted was interpreted to apply only to incestuous relationships, not to non-incestuous miscegenetic marriages such as alleged here.

GILLESPIE, Justice.

Appellant, a Negro woman, was indicted, tried and convicted of cohabiting with Elsie Arrington, a white man, who was jointly indicted with appellant. Appellant was granted a severance and separately tried. The indictment was drawn under Section 2000, Mississippi Code of 1942, as amended by Chapter 241, Laws of 1956. The indictment did not charge that appellant and the man with whom she was alleged to have cohabited were persons within the degrees within which marriages are declared by law to be incestuous and void. It charged that appellant and Arrington were of different races, by reason of which fact their marriage would be "incestuous and void".

[*Demurrer to Indictment*]

Appellant filed a demurrer to the indictment. She also filed a plea of former acquittal in a trial before a justice of the peace where she was charged with a misdemeanor under Section 1998, Mississippi Code of 1942, the general statute denouncing adultery and fornication. The State concedes said former acquittal, but denies that such former acquittal constitutes former jeopardy; and in this contention the State is correct if appellant was sufficiently charged with a felony under Section 2000.

The State does not contend that had the trial court sustained the demurrer it could have amended the indictment so as to charge that appellant and Arrington were persons within the degrees within which marriages are declared to be incestuous and void (under Sections 457 and 458, Code of 1942). The State rests its case on the contention that cohabitation between a white person and a Negro, between whom marriages are prohibited by Section 459, Mississippi Code of 1942, is punishable as a felony under Code Section 2000, without regard to whether the offending parties are prohibited by law from marrying under the incest statutes, Code Sections 457 and 458. If the State is correct, the demurrer to the indictment was properly overruled and appellant was lawfully convicted. If the State is not correct, the indictment charged no crime and the conviction was unlawful.

The sole question is whether or not Code Section 2000, as amended by Chapter 241, Laws of 1956, makes it a crime for a white person and a Negro to cohabit, or live together as husband and wife, or be guilty of a single act of adultery or fornication.

[*Statute Quoted*]

Code Section 2000, with that part added by Chapter 241, Laws of 1956, in italics, is as follows: "Persons being within the degrees within

which marriages are declared by law to be incestuous and void, *or persons whose marriage is prohibited by law by reason or * race or blood and which marriage is declared to be incestuous and void,* who shall cohabit, or live together as husband and wife, or be guilty of a single act of adultery or fornication, upon conviction shall be punished by imprisonment in the penitentiary for a term not exceeding ten (10) years."

The statutes prohibiting incestuous marriages are Code Sections 457 and 458, and by these Sections the Legislature has declared what marriages are declared to be *incestuous and void.* These statutes have nothing to do with the prohibition of marriages between white persons and persons of the Negro or mongolian races; marriages between the latter being prohibited by Code Section 459. Those marriages which the statutes declare to be *incestuous and void* are those between persons within the degrees set out in Code Sections 457 and 458. A marriage between a white person and a Negro would not be incestuous; it would be miscegenetic.

It should be noted that when the legislature attempted to amend Code Section 2000, it was provided by statute that marriage between persons within the degrees stated in Code Sections 457 and 458 was punishable by Code Section 2234 by imprisonment not exceeding ten years in the penitentiary; and by the terms of Code Section 459, marriage between persons prohibited by that Section was also punishable under Code Section 2234. And before the 1956 amendment, Section 2000 denounced the crime of cohabitation, etc., between persons within the degrees within which marriages are prohibited by law as being incestuous and void. The question is whether the 1956 amendment was sufficient to make cohabitation, etc., between a white person and a Negro punishable under said Code Section 2000. (Of course, regardless of incestuous or miscegenetic relationships, it would constitute a crime under Code Section 1998, under which appellant was tried and acquitted.)

It presents a serious question whether or not the persons sought to be brought within the terms of Code Section 2000 by the 1956 amendment must be married to be guilty under the Statute. It is probable that the Legislature meant by use of the words "persons whose marriage is prohibited" to include persons who are prohibited by law from marrying; and by use of the words, "which marriage" to mean "between whom marriage" is declared, etc. Appellant and Elsie Arrington were not married, but we pass over this question and assume that the statute does not require that the offending parties be married.

[*Only Incest Prohibited*]

The 1956 amendment requires that the cohabitation, etc., must be between persons who are prohibited by law from marrying either because of race (miscegenetic) or blood (incestuous). If the amendment had stopped there, we would have less difficulty with the statute, but the amendment went further by adding "and which marriage is declared to be *incestuous and void.*" (Emphasis ours.) The quoted phrase joined by the conjunctive "and" makes the incestuous relationship an element of the crime. This is a plain requirement of the statute. It may be that the legislature intended to say "incestuous or miscegenetic and void." But this Court cannot amend the act so as to make persons subject to punishment thereunder who are not otherwise punishable by the express terms thereof.

It is settled law that penal statutes must be strictly construed. We must enforce the statute as written, not as we think the legislature might have intended to write it; for the question is not what the legislature intended to enact, but what is the meaning of that which it did enact. For an act to constitute a crime, it must come within both the letter and spirit of the act. Of course, this does not mean that the court should be hypercritical in construing an act nor give it a strained or technical interpretation. These principles are so universally accepted that no citation of authority is necessary.

Actually there is no real interpretative question involved. The statute expressly provides that a marriage between appellant and Arrington must be incestuous and void. The State does not contend that any question of incestuous relationship is involved. The statutes define the relationships that are incestuous, and differences in race cannot be deemed incestuous.

For the reasons stated the indictment did not charge a crime punishable under Code Section 2000 and the case must be reversed and appellant discharged.

Reversed and appellant discharged.

ROBERDS, P.J., and LEE KYLE and ARRINGTON, J.J., concur.

FAMILY RELATIONS
Miscegenation—Mississippi

Mary ROSE v. STATE of Mississippi.

Supreme Court of Mississippi, December 15, 1958, 107 So.2d 730.

SUMMARY: A white woman was indicted in a Mississippi court for unlawfully cohabiting with a Negro man, on the basis of a statute providing that persons whose marriage is prohibited by law by reason of race or blood, "and which marriage is declared to be incestuous and void," who shall cohabit, shall be guilty of a felony. On a plea of guilty, without advice of counsel, she was convicted. At the same term of court she employed an attorney and moved for leave to withdraw her plea of guilty, to set aside the judgment based on it, and to be permitted to plead not guilty to the charge. The motion was overruled, and she appealed. The Supreme Court of Mississippi reversed and remanded on the basis of the decision in *Ratcliff v. State* [*supra*, p. 127], holding that the statute in question makes unlawful incestuous, not miscegenetic, relationships and that an indictment charging unlawful cohabitation between a white and Negro person, but not incest, does not support a conviction under the statute.

ETHRIDGE, Justice.

The decision in this case is controlled by that in Ratcliff v. State, Miss., 107 So.2d 728.

Appellant, a white woman, was indicted in the Circuit Court of Jones County under Miss.Code 1942, Sec. 2000, as amended by Ch. 241, Laws of 1956, for unlawfully cohabiting with a Negro man. Without advice of counsel, she pleaded guilty, and was sentenced to fifteen months in the penitentiary. At the same term of court, she employed an attorney and moved for leave to withdraw her plea of guilty, to set aside the judgment based thereon, and to be permitted to plead not guilty to the charge. She averred in the motion that she was not guilty and had a meritorious defense; that she entered the plea under the mistaken idea that she would receive a small fine, and in order to protect the good name and reputation of her four children. After a hearing, the circuit court overruled the motion, from which action she appealed.

[*Ratcliff Case Cited*]

In Ratcliff v. State, supra, it was held that Code Sec. 2000, as amended by Ch. 241, Laws of 1956, makes the existence of an incestuous relationship an element of the crime; that this Court must apply the plain terms of the act, and cannot amend it so as to make persons subject to punishment under it who are not otherwise punishable under it by its express terms. A marriage between a white person and a Negro would not be incestuous; it would be miscegenetic. In Ratcliff and in the instant case, the State does not contend that any incestuous relationship is involved. The indictment against appellant charges that appellant is a white woman and the man is of the Negro race. The evidence on the hearing of the motion reflected those facts. It is undisputed that the prosecution was under Code Sec. 2000, as amended. Since the indictment therefore charged no crime under that statute, the circuit court should have noticed that manifest and fatal error in the indictment, and should have sustained appellant's motion to withdraw her plea of guilty and to set aside the judgment based thereon. Hence the order of the circuit court overruling that motion, from which this appeal was taken, is reversed, judgment rendered here sustaining the motion, and the cause is remanded.

Reversed, judgment rendered sustaining motion, and cause remanded.

McGHEE, C.J., and HALL, LEE and HOLMES, J.J., concur.

GOVERNMENTAL FACILITIES
Court Houses—Virginia

E. A. DAWLEY, Jr. v. City of NORFOLK, Virginia, a municipal corporation, Thomas F. Maxwell, City Manager, Calvin H. Dalby, Director of Public Safety, and S. C. Morrissette, Director of Public Works.

United States Court of Appeals, Fourth Circuit, October 15, 1958, 260 F.2d 647.

SUMMARY: The plaintiff, a Negro attorney practicing in Norfolk, Virginia, brought an action in federal district court against officials of the city, to enjoin them from maintaining signs designating restrooms in a court house as being for use of colored persons. The plaintiff contended that the presence of the signs tended to infer that Negro attorneys are inferior and thus to diminish their earning capacity, in violation of the Fourteenth Amendment. The district court granted the motion of the defendant city officials for summary judgment on the ground that the judges of state courts sitting in the court house, rather than the city officials, have control over the restrooms. The court also stated: "It may well be that the maintenance of separate but equal toilet facilities for the races falls within the classification of a reasonable rule and regulation, particularly where the courthouse itself is available to all races." ——— F.Supp. —, 3 Race Rel. L. Rep. 213 (E.D. Va. 1958). The Court of Appeals for the Fourth Circuit affirmed, reasoning that since the matter lay within the state's power to regulate the internal operations of a state court, federal interference was not required, and that the decision as to whether to "grant the relief prayed was within the sound discretion of the District Judge sitting in a court of equity."

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

PER CURIAM:

E. A. Dawley, Jr., an attorney of the Negro race practicing law at Norfolk, Virginia, seeks in this case a declaratory judgment and a permanent injunction restraining the City of Norfolk, Virginia, and certain of its administrative officers from maintaining certain signs in the State courthouse in that city indicating the segregation of the races in the public restrooms maintained in the building for men and women. The District Judge after hearing, without expressing approval of the practice and without prejudice to the right of the plaintiff to seek an appropriate remedy in the State court, dismissed the complaint. We think this action was properly taken. Whether or not the Federal court should take cognizance of the case and grant the relief prayed was within the sound discretion of the District Judge sitting in a court of equity. The matter was one which affected the internal operations of the court of the State and within its power to regulate. Under these circumstances, interference on the part of the Federal court was not required and the action of the District Judge in dismissing the case was in accord with the principles laid down in Com. of Pennsylvania v. Williams, 294 U.S. 176, 185, 55 S.Ct. 380, 79 L.Ed. 841.

Affirmed.

GOVERNMENTAL FACILITIES
Private Hospitals—North Carolina

Hubert A. EATON, Daniel C. Roane, and Samuel James Gray v. BOARD OF MANAGERS OF THE JAMES WALKER MEMORIAL HOSPITAL; Alan A. Marshall, Chairman, H. E. Hamilton, Secretary; the City of Wilmington, North Carolina, Dan D. Cameron, Mayor; and the County of New Hanover, North Carolina, Ralph T. Harton, Chairman of County Commissioners.

United States Court of Appeals, Fourth Circuit, November 29, 1958, 261 F.2d 521.

SUMMARY: Three Negro doctors instituted a class action in a North Carolina federal district court against officials of a hospital in the city of Wilmington and against the city and county, seeking to be admitted to practice medicine in the hospital as members of the "courtesy staff." Defendants argued that even if such privileges were denied to plaintiffs solely because of their race, the hospital was private and therefore the denial was not "state action" contrary to the Fourteenth Amendment. The court found that half of the land on which the hospital stands had been conveyed by the city and county in 1901 to the hospital board in order that a new hospital might be built thereon from privately donated funds, to hold "so long as the same shall be used and maintained as a hospital for the benefit of the city and county." The court also noted that the state private act of 1901 chartering the hospital provided that its purpose was to remove the management of the hospital as far as possible from the vicissitudes which generally result when such an institution is left in control of local municipal authorities. The court found no element of public control over the hospital arising from the fact that the city and county had a right of reverter in the land, or that the original members of the independent, self-perpetuating hospital board were named by city and county officials, or that the city and county had in the past made contributions to operating expenses and currently paid the hospital for care of indigent residents. The complaint was dismissed for lack of federal jurisdiction. 164 F.Supp. 191, 3 Race Rel. L. Rep. 1006 (E.D. N.C. 1958). The Court of Appeals for the Fourth Circuit affirmed, finding that the facts clearly show that the hospital had been privately operated for a number of years, free of state control, and holding that the fact that the deed to its land was upon express trust to operate the hospital for the benefit of the city and county did not make it a public corporation, citing the *Girard College Case* [138 A.2d 844, 3 Race Rel. L. Rep. 188 (Pa. 1958); *appeal dismissed and certiorari denied*, 78 S.Ct. 1383, 3 Race Rel. L. Rep. 424 (1958)]. The court also held that the fact that a self-governing body had been placed in charge of the hospital by an act of the legislature was not decisive, stating that the other features of its present management give it a private status.

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

SOPER, Circuit Judge.

The question in this case is whether certain Negro physicians practicing in Wilmington, North Carolina, are entitled to a declaratory judgment that they may not be excluded from courtesy staff privileges at the James Walker Memorial Hospital in that city solely on account of their race or color. The suit was brought by three physicians against the Board of Managers of the hospital, the City of Wilmington, and the County of New Hanover. Federal jurisdiction is based on the theory that the Board of Managers of the hospital, a corporation created by an act of the General Assembly of North Carolina, is an instrumentality of the City of Wilmington and the County of New Hanover and as such is an agency of the State of North Carolina, which is prohibited by the first section of the Fourteenth Amendment to the Federal Constitution from denying to any person within its jurisdiction the equal protection of the laws. Jurisdiction is also based on the civil rights statutes, 42 U.S.C.A. §§ 1981, 1983, which furnish redress for persons who are deprived of their constitutional rights under color of any State statute or usage.

The defendants filed a motion to dismiss the complaint on the ground that the hospital is a private corporation not subject to State control, and hence the discriminatory treatment complained of can not be regarded as State action cognizable in a Federal court. The District Judge being of the opinion (164 F.Supp. 191) that this position was sustained by the undisputed facts set forth in the pleadings, stipulation and affidavits of the parties, dismissed the complaint.

The City of Wilmington and the County of New Hanover were authorized by Chapter 23 of the Public Laws of North Carolina of 1881, to establish and maintain a hospital and accordingly acquired land, erected a building thereon and established a hospital under the control of the Board of Managers of the City Hospital of Wilmington. In 1900, James Walker, a charitable citizen of Wilmington, furnished funds to build a modern hospital on the site of the City Hospital, and the old building was razed and construction of the new building was begun. It was completed on July 19, 1901, after Mr. Walker's death. He specified in his will that his executors should provide such moneys as were necessary for the completion of the building and should deliver and turn it over to the proper authorities of the City and of the County to be held and used by them as a hospital for the sick and afflicted.

[*Hospital Chartered*]

As a result of this benefaction the Board of Managers of the James Walker Memorial Hospital was chartered by Chapter 12 of the Private Laws of North Carolina of 1901. This statute noted the liberality of the donor in providing a modern hospital for the maintenance of the sick and infirm poor who might become a charge upon the City and County, as well as for other persons, and declared that it was desirable that the management of the hospital be removed as far as possible from the control of local municipal authorities, subject to changing political conditions, and to that end chartered the hospital as a body corporate, provided for the selection of the individuals to constitute the original Board of Managers and made them a self-perpetuating body empowered to succeed to the powers and duties of the Board of Managers of the City Hospital after the new hospital had been turned over to and accepted by the City and County. Upon the completion of the building in 1901, the City and County conveyed the tract of land upon which it stood to the new Board of Managers of the hospital to hold in trust for the use of the hospital so long as it should be maintained as such for the benefit of the City and County, with reverter to the City and County in case of its disuse or abandonment. Subsequently additional land was acquired and additional buildings were erected by the Board of Managers.

[*Operating Authority*]

The hospital has been operated under the authority of this Board of Managers since its charter was granted in 1901. In that charter it was stipulated that New Hanover County should provide the sum of $4,800 annually and the City of Wilmington $3,200 annually, to be placed in the hands of the Board of Managers of the hospital for the maintenance and medical care of the sick and infirm poor admitted thereto. Subsequent acts of the General Assembly, passed in 1907, 1915, 1937, 1939, and 1951, authorized various appropriations to be made for these purposes by the City and County. All of these provisions, however, were declared to be unconstitutional by the Supreme Court of North Carolina in Board of Managers of the James Walker Memorial Hospital of Wilmington v. City of Wilmington, 1953, 237 N.C. 179, 74 S.E.2d 749, in which the hospital sought a declaratory judgment adjudging the rights of the hospital to support from the City and County for the care of their sick and indigent. The court held that the appropriations for the hospital contained in the acts of 1901, 1907 and 1915 were invalid since the support of the hospital was not a necessary governmental expense and had not been approved by a majority of the qualified voters of the area, which is a prerequisite to the validity of an appropriation for an unnecessary governmental expense under Article VII, Section 7, of the State Constitution. The provisions for the payment of moneys to the hospital under the acts of 1937, 1939 and 1951 were also held invalid on the ground that they contravened the provisions of Article II, Section 29, of the State Constitution, adopted by the vote of the people of the State in 1916, which prohibited the passage of any local act relating to health.

[*Care of Indigents*]

The Supreme Court of North Carolina, however, pointed out in the cited case that the

General Assembly of the State has power to authorize the governing body of any city or county to contract with the hospital for the medical care and hospitalization of the sick and poor of the area. Such a statute had previously been enacted for certain other towns and counties, and a similar act, applicable to the City and County in this case, was passed by the General Assembly of North Carolina, in Chapter 878 of the acts of 1953, G.S. § 153-176.1, under which funds have been paid to the James Walker Memorial Hospital by the City and County under contract. The amounts thus paid and the total cash revenues of the hospital from 1952 to 1957 were as follows:

Year	Receipts City of Wilmington & County of New Hanover	Total All Cash Receipts
1952	$24,149.60	$ 922,061.78
1953	21,672.75	974,520.02
1954	60,867.32	1,081,903.33
1955	46,285.40	1,081,144.80
1956	64,804.36	1,228,403.34
1957	60,271.05	1,412,509.56

At the time of the trial of the suit the City did not have a contract with the hospital and provided no revenue to it, but the County operated under a contract dated May 6, 1957, for the care of certified indigent patients whereby it paid a specified per diem, which amounted to $16 per day per patient. The per diem cost was between $18 and $19.

On March 19, 1955, the plaintiffs applied for staff privileges at the hospital, which consisted of allowing the use of private rooms and pay wards for the patients of physicians. The applications were denied, and for the purpose of this action it is conceded that the applications were properly made but were denied by the Board of Managers solely on account of the race of the applicants. The plaintiffs argue that this action of the Board amounts to action by the State which the Federal court has power to interdict. They rest their contention mainly upon the following circumstances:

[*State Action Alleged*]

1. The establishment of the original hospital on the present site and the appropriation of certain moneys for its maintenance by the City and County under authority of Chapter 23 of the act of the General Assembly of North Carolina, 1881.

2. The operation of the hospital by the City and County thereafter until 1901.

3. The declarations in Chapter 12 of the act of 1901, incorporating the James Walker Memorial Hospital, that the City and County had been provided with a modern hospital for the care of the sick and infirm poor of the locality and that the City and County should appropriate certain moneys annually for the maintenance of the hospital, and also that the Board of Managers named in the act should succeed to all the powers and duties of the Board of Managers of the former City Hospital as soon as the new building was completed and turned over to the City and County and accepted by them.

4. The declaration in the will of James Walker that after the completion of the new hospital his executors should deliver and turn it over to the authorities of the City and County to be held and used by them as a hospital for the treatment of the sick and infirm.

5. The provisions of the deed by which the site of the hospital was conveyed by the City and County to the Board of Managers of the James Walker Memorial Hospital in 1901, in trust for the use of the hospital so long as it should be maintained for the benefit of the City and County, with reverter to the City and County in case of disuse or abandonment.

6. The substantial appropriations for the support and maintenance of the hospital by the City and County under the authority of acts of the General Assembly between 1907 and 1951. It is said that these appropriations were made to carry out the provisions of Article XI, Section 7, of the State Constitution, which declares the duty of the General Assembly to make beneficent provision for the poor and unfortunate and to appoint a Board of Public Charities to supervise all State charitable and penal institutions.

With respect to the decision in Board of Managers of the James Walker Memorial Hospital of Wilmington v. City of Wilmington, supra, it is said that the court did not declare it beyond the power of the State to make appropriations for the maintenance of a hospital but merely held that the appropriations referred to were invalid because they had not been made in the manner prescribed by the State Constitution; and hence the decision may not be taken as authority for the proposition that the hospital is not an instrumentality of the State.

[*Act of 1901*]

With respect to the act of 1901 creating the new hospital corporation and the deed of 1901 conveying to it the site of the hospital, it is contended that the City and County were thereby made the beneficiaries of the trust and the Board of Managers of the hospital was made the trustee and an agency of the State subject to the provisions of the Federal Constitution. Reference is made to Commonwealth of Pennsylvania v. Board of Directors of City Trusts of City of Philadelphia, 353 U.S. 230, 77 S.Ct. 806. 1 L.Ed.2d 792, where it was held that the managing board of Girard College was made an agency of the State by an act of the Pennsylvania Legislature and therefore could not exclude Negro children as directed by the will of the founder.

Finally, it is contended, on the authority of our decision in Kerr v. Enoch Pratt Free Library of Baltimore City, 4 Cir., 149 F.2d 212, that the establishment of the Board of Managers of the James Walker Memorial Hospital, as an independent self-perpetuating body by the act of North Carolina Legislature in 1901, is not inconsistent with its status as an instrumentality of the State. It is emphasized that in the cited case we held that the Board of Trustees of the Library was an agency of the State of Maryland although it had been given control of the institution with the power of self-perpetuation by an act of the Maryland Legislature.

[*State Instrumentality?*]

The plaintiffs rightfully confine their effort on this appeal to showing that the hospital is an instrumentality of the State. They do not argue that the exclusion of qualified physicians solely because of their race from an institution devoted to the care of the sick is indefensible, as they might well do if this court was the proper forum to determine the ethical quality of the action. As a Federal court we are powerless to take into account this aspect of the case. We may not interfere unless there is State action which offends the Federal Constitution. From this viewpoint we find no error in the decision of the District Court for the facts clearly show that when the present suit was brought, and for years before, the hospital was not an instrumentality of the State but a corporation managed and operated by an independent board free from State control.

This has not always been the case. In 1881, when the hospital was established, and thereafter during the period ending in 1901, when it was supported and operated by municipal authority, it might well have been described as a State agency even though the funds for its operation had been illegally appropriated by the municipalities. But in that year a basic change took place when, taking advantage of the beneficence of Mr. Walker, the City and County conveyed the land on which the old building stood to the Board of Trustees of the James Walker Memorial Hospital, a new corporation created by an act of legislature with full powers of management and self-perpetuation. At that time a new building was erected on the site with funds provided by the benefactor. It would seem from the evidence that the hospital then ceased to be a public agency, although in the subsequent years until 1951 it received certain financial support from the City and County, the amount of which the record before us does not reveal. Any doubt on this point vanished in 1952 and 1953, when annual appropriations came to an end as the result of the decision of the Supreme Court of the State, and patients sent to the hospital by the local governments were treated and paid for under contract on a per diem basis. It is beyond dispute that from that time on the civic authorities have had no share in the operation of the hospital and the Board of Managers have been in full control.

[*Express Trust Cited*]

This conclusion is not precluded by the terms of the deed through which the corporation gained title to the land upon express trust to operate the hospital for the benefit of the City and County. A very similar situation was before the Supreme Court of the United States in Board of Trustees of Vincennes University v. State of Indiana, 14 How. 268, 14 L.Ed. 416, where it was held that a grant of public land by an act of Congress to the Board of Trustees of the University did not make the Board a public corporation. The Court said, 14 How. at pages 276–277:

> "* * * The corporators were vested with all the necessary powers to carry out the trust. And for the purposes of the trust, the title became vested in them, as soon as they acquired a capacity to receive it. This corporation had no political powers, and

could, in no legal sense, be considered as officers of the State. They were not appointed by the State. Their perpetuity depended upon the exercise of their own functions; and they were no more responsible for the performance of their duties, than other corporations established by the State to execute private trust.

"So far as regards the trust confided to the complainants, there is nothing which, by construction, can make it a public corporation. * * *"

[*Girard College Case*]

The course of the decision in the case of Girard College also illustrates the point.[1] In Commonwealth of Pennsylvania v. Board of Directors of City Trusts of City of Philadelphia, 353 U.S. 230, 77 S.Ct. 806, 1 L.Ed.2d 792, the Supreme Court held that the exclusion of Negro boys from Girard College violated the Fourteenth Amendment although the college was established with funds provided under the will of Stephen Girard, which directed that admissions be limited to white male orphans. The will named the City of Philadelphia as trustee but subsequently, and for a long period of years before the institution of the suit, the trust had been administered by the Board of Directors of City Trusts of Philadelphia, a body created by an act of the Pennsylvania Legislature. The Court held that under the terms of the statute the Board was an agency of the city and therefore the exclusion of Negro boys was unconstitutional. After this decision the Board was removed as trustee and the collgee was turned over to private trustees under an order of the Orphans' Court of Philadelphia and the restriction of the college to white students was continued. On appeal to the Supreme Court of Pennsylvania it was held that this procedure was not inconsistent with the mandate of the Supreme Court of the United States and did not violate the Fourteenth Amendment. In re Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844. The case was then appealed to the Supreme Court of the United States, which granted a motion to dismiss the appeal and also, treating the case as a petition for writ of certiorari, denied the writ. Later, on October 13, 1958, reconsideration of this decision was denied, 79 S.Ct. 14.

The State Supreme Court pointed out that the Supreme Court of the United States based its decision in 1957 only on the ground that the managing board then in control of the college had been constituted an agency of the State by the enabling act and was therefore subject to the Fourteenth Amendment; but that the new board thereafter set up by the Orphans' Court of Philadelphia, being composed of private citizens, was not a State agency and was therefore free to carry out the terms of the Girard will. The court held that the inability of the old Board to discriminate in the admission of students to the college affected the trustee and not the trust and that it was within the power of the Orphans' Court to substitute a new trustee in order to effectuate the charitable purposes of the testator. The court also held that the removal of the old and the substitution of new trustees by the court did not constitute State action within the scope of the Amendment; and it rejected the theory that State action is inherent in charitable trusts generally even if they are not administered by an agency of the State. We find no decision to the contrary.

[Kerr *Case Distinguished*]

The plaintiffs contend that the pending case is indistinguishable from our decision in Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F.2d 212, where we held that the Board of Trustees of the Library was a City agency notwithstanding the fact that its charter provided that it should be managed by a private board of trustees created by the donor and clothed with power to appoint their successors. In our view the cases are clearly distinguishable. The similarity between them is confined to the one circumstance: that in each instance a self-perpetuating governing body had been placed in charge by an act of legislature in compliance with the wishes of the donor. The distinguishing features, on the other hand, are decisive. The Library was completely owned and largely supported from the beginning by the City and at the time the suit was brought it was occupying a modern building erected by the City on land owned by the City and, more importantly, substantially all of the revenues of the institution were derived from the City in the form of budgetary appropriations. In short, it was shown

1. For an interesting discussion of this case by Elias Clark, see Charitable Trusts, The Fourteenth Amendment and the Will of Stephen Girard, 66 Yale L.J. 979.

that the Library was so completely subsidized by the City that in practical effect its operations were subject to the City's control. In the pending case, as we have shown, the hospital is neither owned nor controlled by the municipalities and the revenues derived from them on a contract basis amount to less than 4½ per cent of its total income.

Affirmed.

INDIANS
Indian Lands—New York

The SENECA NATION OF INDIANS v. Wilber M. BRUCKER, Secretary of the Army, and Emerson C. Itschner, Major General, United States Army Corps of Engineers.

United States Court of Appeals, District of Columbia Circuit, November 25, 1958, 262 F.2d 27.

SUMMARY: The Seneca Indians sought an injunction in the U. S. District Court for the District of Columbia to restrain the Secretary of the Army and a major general of the Army Corps of Engineers from constructing an Allegheny reservoir project that would flood a substantial amount of Indian lands. The complaint was dismissed. 162 F.Supp. 580 (D. D. C. 1958). On appeal, it was agreed that the proposed flooding would infringe Indian rights acquired by a 1794 treaty and that Congress could authorize a taking by eminent domain despite such treaty, but the question remained as to whether Congress had shown sufficiently clearly its intention to do so. The Court of Appeals for the District of Columbia, looking at the legislative history of 1941 and 1957 appropriation acts, determined that Congress knew that the specific lands in question would be flooded and had authorized the taking of them.

ORGANIZATIONS
NAACP—Arkansas

Daisy BATES v. CITY OF LITTLE ROCK.
Birdie WILLIAMS v. CITY OF NORTH LITTLE ROCK.

Supreme Court of Arkansas, December 22, 1958, 319 S.W.2d 37.

SUMMARY: Arkansas NAACP officers were fined in state court for violating the "Bennett Ordinance" of the cities of Little Rock and North Little Rock. The ordinance requires organizations operating in the city to furnish certain information, including "A financial statement of . . . dues, fees, assessments, and/or contributions paid, by whom paid. . . ." Defendants had refused to furnish the latter information on the grounds that an anti-NAACP climate in the state caused them to fear reprisals against members should their identity be revealed, and that anonymous participation in organizations was protected by the First and Fourteenth Amendments in the absence of a compelling reason or justifiable cause for disclosure. On appeal, the Supreme Court of Arkansas affirmed, two judges dissenting. It was reasoned that the cities could demand the information here called for in order to de-

termine whether particular organizations are charitable or non-profit so as to qualify for statutory tax exemption, and that "when the required information is a mere incident to a legal result, then the information should be furnished." Asserting that the Constitution does not guarantee anonymity at all events, the court distinguished the case of *NAACP v. Alabama*, [——U.S.——, 78 S.Ct. 1163, 3 Race Rel. L. Rep. 611 (1958)], as one in which membership lists had been sought for the purpose of forcing the NAACP out of a state instead of for legitimate ends. Being uniformly applied to all organizations claiming tax immunity, the ordinance was likened by the court to the Alabama School Placement Law which had been upheld in the absence of a showing that it had not been uniformly administered.

McFADDIN, Justice.

The issue on these appeals is the constitutionality of the so-called "Bennett Ordinance", which was enacted by the City of Little Rock, and also by the City of North Little Rock. Appellant Bates was fined $25 for violation of the Little Rock ordinance; and appellant Williams was fined $25 for violation of the North Little Rock ordinance. There were separate appeals; but the cases are disposed of in this single opinion since constitutionality is the point at issue in each case, and the claims and defenses of each appellant are the same.

["*Bennett Ordinance*"]

On October 14, 1957, the City of Little Rock [1] adopted its Ordinance No. 10638 (here under attack), reading in its entirety as follows:

"An Ordinance Requiring Certain Organizations Functioning or Operating Within the City of Little Rock, Arkansas to List Certain Information With the City Clerk: and for Other Purposes.

"Whereas, it has been found and determined that certain organizations within the City of Little Rock, Arkansas have been claiming immunity from the terms of Ordinance No. 7444, as amended, governing the payment of occupation licenses levied for the privilege of doing business within the city, upon the premise that such organizations are benevolent, charitable, mutual benefit, fraternal, or non-profit, and

"Whereas, many such organizations claiming the occupation license exemption are mere subterfuges for businesses being operated for profit which are subject to the occupation license ordinance;

"Now, Therefore, be it Ordained by the City Council of the City of Little Rock, Arkansas:

"Section 1. The word 'organization' as used herein means any group of individuals, whether incorporated or unincorporated.

"Section 2. Any organization operating or functioning within the City of Little Rock, including but not limited to civic, fraternal, political, mutual benefit, legal, medical, trade, or other organization, upon the request of the Mayor, Alderman, Member of the Board of Directors, City Clerk, City Collector, or City Attorney, shall list with the City Clerk the following information within 15 days after such request is submitted:

"A. The official name of the organization.

"B. The office, place of business, headquarters or usual meeting place of such organization.

"C. The officers, agents, servants, employees or representatives of such organization, and the salaries paid to them.

"D. The purpose or purposes of such organization.

"E. A financial statement of such organization, including dues, fees, assessments and/or contributions paid, by whom paid, and the date thereof, together with the statement reflecting the disposition of such sums, to whom and when paid, together with the total net income of such organization.

"F. An affidavit by the president or other officiating officer of the organization stating whether the organization is subordinate to a parent organization, and if so, the name of the parent organization.

"Section 3. This ordinance shall be cumulative to other ordinances heretofore passed by the City with reference to occupation licenses and the collection thereof.

"Section 4. All information obtained pur-

1. About the same time the City of North Little Rock adopted its Ordinance No. 2683; and the Little Rock ordinance and the North Little Rock ordinance are in all substantial respects entirely similar.

suant to this ordinance shall be deemed public and subject to the inspection of any interested party at all reasonable business hours.

"Section 5. Any section or part of this ordinance declared to be unconstitutional or void shall not affect the remaining sections of the ordinance, and to this end the sections or sub-sections hereof are declared to be severable.

"Section 6. Any person or organization who shall violate the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than $50.00 nor more than $250.00, and each day of violation shall constitute a separate offense. The City Council in the enforcement of this ordinance shall have the power to seek injunctive relief.

"Section 7. It has been found and determined by the City Council that certain organizations operating within the City of Little Rock have failed to comply with the terms of Ordinance No. 7444, as amended, governing the payment of occupation licenses, and as a result thereof, needed revenue is being lost, and the enactment of this ordinance will provide for more efficient administration of such ordinance. Therefore, an emergency is declared to exist, and this ordinance being necessary for the preservation of the public peace, health, and safety, shall take effect and be in force from and after its passage and approval."

[*Bennett Ordinance and NAACP*]

Daisy Bates, a resident of Little Rock, is the State President of the National Association for the Advancement of Colored People (hereinafter referred to by the letters "NAACP"); and Birdie Williams, a resident of North Little Rock, is President of the North Little Rock Branch of the NAACP. Daisy Bates was notified to comply with the Little Rock ordinance, and Birdie Williams was notified to comply with the North Little Rock ordinance. Each furnished all the information required by the ordinance except that part of Section E, which requires that there be furnished: "A financial statement of such organization, including dues, fees, assessments, and/or contributions paid, by whom paid, and the date thereof, together with the statement reflecting the disposition of such sums, to whom and when paid, together with the total net income of such organization". In refusing to furnish the information required by Section E, Daisy Bates (by her attorney) advised the City of Little Rock:

"E. The financial statement is as follows:

"January 1, 1957 to December 1, 1957	
"Total receipts from memberships and contributors	$1,791.55
"Total expenditures	1,491.46
"Balance on Hand	$ 300.09

"F. I am attaching my affidavit as president indicating that we are a Branch of the National Association for the Advancement of Colored People, a New York Corporation.

"We cannot give you any information with respect to the names and addresses of our members and contributors or any information which may lead to the ascertainment of such information. We base this refusal on the anti-NAACP climate in this State. It is our good faith and belief that the public disclosure of the names of our members and contributors might lead to their harassment, economic reprisals, and even bodily harm. Moreover, even aside from that possibility, we have been advised by our counsel, and we do so believe that the City has no right under the Constitution and laws of the United States, and under the Constitution and laws of the State of Arkansas to demand the names and addresses of our members and contributors. We assert on behalf of the organization and its members the right to contribute to the NAACP and to seek under its aegis to accomplish the aims and purposes herein described free from any restraints or interference from City or State officials. In addition we assert the right of our members and contributors to participate in the activities of NAACP anonymously, a right which has been recognized as the basic right of every American citizen since the founding of this country.

"I am enclosing herein a copy of the Constitution of the National Association for the Advancement of Colored People, and the Constitution and By-Laws for Branches of the National Association for the Advancement of Colored People."

[*Fine and Appeal*]

A similar refusal for similar reasons was made by Birdie Williams, concerning the North Little Rock request. For refusal to furnish the requested information each appellant was fined $25 by the Circuit Court; and each in prosecuting her appeal to this Court raises this Federal issue: the ordinance involved—insofar as it requires the names and addresses of the members of and contributors to, the local branch of the NAACP, is an invasion of the rights guaranteed by the amendments to the Constitution of the United States.[2] All the other points urged blend into the one just stated.

The appellants have cited and discussed, inter alia: National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893; Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070; Sweezy v. State of New Hampshire, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311; Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660; Bridges v. State of California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192; Pennekamp v. State of Florida, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295; National Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344; Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098; DeJonge v. State of Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278; Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817; Thornhill v. State of Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; N.A.A.C.P. v. Patty, D.C.E.D.Va. 1958, 159 F.Supp. 503; and American Communications Ass'n, C. I. O. v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925. Also in the oral argument before this Court appellants laid great stress on the case of N.A.A.C.P. v. State of Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, which was decided after the filing of appellant's brief in this Court. It was claimed that N.A.A.C.P. v. State of Alabama was conclusive against the validity of the ordinances here challenged.

It would unduly extend this opinion to review each of the above cases or those cited by appellees. For purposes of this opinion we by-pass the point urged by the Cities—that anonymity is a personal defense and can be claimed only by the organization itself and not by one for it—and we proceed to state our conclusions on the claims that the appellants have made:

[*Purpose of Ordinance*]

I. The primary purpose of each of the ordinances here involved is to obtain revenue for the Cities, and the obtaining of the membership list and the listing of contributors is merely to aid in determining the matter of tax status. The NAACP is not being required to furnish any information other than that which is required of all other organizations seeking immunity from the payment of an occupation tax. The record here shows that the information required by the ordinances involved was required of all organizations claiming tax exemption; and the information was furnished by all of the requested organizations except the NAACP.

In Arkansas, municipalities are creatures of the State and have the powers which the State gives them. Eagle v. Beard, 33 Ark. 497; City of Hot Springs v. Gray, 215 Ark. 243, 219 S.W.2d 930. By Act No. 294 of 1937 (now found in § 19-4601 et seq. Ark.Stats.) the Arkansas Legislature authorized municipalities to enact ordinances levying an occupation tax. This was a revenue meas-

2. To support the contentions for immunity from furnishing the requested information appellants stated in the lower Court and reiterate here: "* * * that Ordinance 10,638 is an unjustified interference with defendant's rights of freedom of speech and assembly as secured and protected by the Constitution of the State of Arkansas [art. 2, § 4; art. 2, § 6] and by the Constitution of the United States of America—namely, the First Amendment as assimilated in the Fourteenth Amendment of the Federal Constitution. It is the contention of the defendant that the City has not shown that there is a compelling reason or a justifiable cause for demanding the contributors' list to the defendant in this case. The defendant would like to cite two United States Supreme Court cases wherein the Supreme Court held that the request of membership lists and contributors' lists was a direct violation of this fundamental constitutional right—namely, freedom of speech. The case is Wieman v. Updegraff, 344 U.S. 183 [73 S.Ct. 215, 97 L.Ed. 216], and there the court said that the right to assemble freely, to join an organization and to participate in its activities is one of the protected rights guaranteed under the Constitution. In Watkins v. United States [354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273], the Chief Justice of the United States wrote: 'There is no general authority to expose the private rights of an individual without justification'. In Sweeney [Sweezy] v. [State of] New Hampshire [354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311], the Court said: 'We do not now conceive of any circumstance wherein a State interest would justify an infringement upon these fields—freedom of speech and freedom of assembly'. It is our contention that the City of Little Rock has not shown that there is a compelling reason or a justifiable cause for requiring the defendant to produce the names of its members and the names of its contributors."

ure. In Talley v. City of Blytheville, 204 Ark. 745, 164 S.W.2d 900, we held that this Act of 1937 was authority for cities to enact occupation tax ordinances as revenue producing measures. Our subsequent cases have followed that holding. In 1947 the City of Little Rock passed its ordinance No. 7444, captioned, "An Ordinance Establishing an Annual Privilege License Tax for Various Businesses, Occupations, and Professions within the City of Little Rock Providing for the Amount Thereof * * *." This ordinance has been amended numerous times by changing the amount to be charged various businesses and professions and adding other businesses and professions as subjects of taxation.

On November 22, 1948 the City of Little Rock passed its Ordinance No. 7809, entitled, "An Ordinance Relieving Charitable Institutions from the payment of Privilege Taxes to the City of Little Rock, Amending Ordinance No. 7444, and For Other Purposes".[3] Thus, by the Ordinance No. 7809, certain charitable or non-profit organizations became exempt from the privilege tax, even though such organization engaged in some kind of business. Such was the status of the law when, on October 14, 1957, the City of Little Rock enacted its Ordinance No. 10638 first copied herein. The City had reason to believe that some of the organizations, who were claiming immunity under Ordinance No. 7809, were not really charitable or non-profit organizations. The City wanted to ascertain what was being done by these organizations claiming exemptions; and so the City passed its ordinance requiring such organization claiming immunity from occupation tax to furnish the City certain information.[4]

[*Uniformity of Application*]

The NAACP is not being required to furnish any information other than is furnished by all other organizations claiming immunity from taxation. Furnishing of membership lists of non-profit organizations in Arkansas, as a basis of being determined a non-profit organization, has been the rule in Arkansas since 1875. Act No. 51 of 1875 (as now found in § 64-1301 Ark.Stats.) provides for the incorporation of a non-profit organization, and Section 2 of that Act (as now found in § 64-1302 Ark.Stats.) says:

> "Any association of persons desirous of becoming incorporated, under the provisions of this act, shall file with the Clerk of the Circuit Court and Recorder for the proper county a copy of their constitution or articles of association, *and a list of all the members*, together with a petition to said court for a certificate of incorporation under the provisions of this act. (Emphasis supplied.)

So it is nothing new to require a non-profit organization to furnish a list of all of the members.[5] The same rule that applies to such organizations seeking corporate status is sought here to be applied to such organizations that seek privilege tax exemptions. The record shows that the rule is being uniformly applied to all organizations.

Requiring the furnishing of information to the taxing power is not an unconstitutional invasion of the freedoms guaranteed. A taxpayer is required to file an income tax return giving the names of the sources of revenue (as, for instance, the name of the corporation and the amount of the dividend received from it); yet all this has

3. The entire text of this Ordinance is as follows:
"Whereas, There are certain charitable institutions in the City of Little Rock which engage in the business of manufacturing, and selling, or other lines of endeavor in order to raise funds for charitable purposes such as the assistance of the needy, and the care and education of the crippled and the blind, and
"Whereas, These institutions are performing in an unselfish manner a service to the community and are rendering untold aid and comfort to persons who are physically handicapped, and
"Whereas, It is believed to be in the best interest of the City and the people of the City of Little Rock to foster and promote such activity on the part of these institutions,
"Now, Therefore, be it Ordained by the City Council of The City of Little Rock, Arkansas:
"Section 1. Each charitable, eleemosynary, non-profit organization whose purpose is to assist the needy and bring care, training and comfort to the physically handicapped, is hereby exempt from the payment of a privilege tax for the privilege of carrying on such business or occupation within the City of Little Rock.
"Section 2. Ordinance No. 7444 is hereby amended to conform to the provisions of this ordinance.
"Section 3. All ordinances and parts of ordinances in conflict herewith are hereby repealed."

4. Section 7 of Art. 5 of the Constitution and By-Laws for Branches of the NAACP says that the local branches shall remit, "* * * the net proceeds of each entertainment or fund raising effort by a Branch shall be divided equally between the Branch and the National Office * * *" When we consider that shows and amusement places and other forms of Entertainment are taxable under the occupation tax ordinance, certainly the City would have some right to ascertain who was belonging to the NAACP and who was making contributions to it, because it was claiming an immunity and yet sending part of its money for some other use outside of the State.

5. In 8 Ark.Law Review 110 there is an interesting case note entitled: "Illegal activities by non-profit corporations".

been held to be within the power of the Sovereign. See Hubbard v. Mellon, 55 App.D.C. 341, 5 F.2d 764. Furthermore, the United States Supreme Court, in United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989, upheld a law which required the furnishing of the *names of contributors and amounts* paid by each to any person engaged in seeking to obtain legislation. So the rationale of the holdings seem to be: when the required information is a mere incident to a permissible legal result, then the information should be furnished. That is the situation in the case at bar; and we find nothing in Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460, or in First Unitarian Church of Los Angeles v. Los Angeles County, 357 U.S. 545, 78 S.Ct. 1350, 2 L.Ed.2d 1484, which affects the conclusion here reached.

[*Anonymity Not Guaranteed*]

II. The claim, that it may hurt the prospects of the NAACP to furnish to the City its membership list and the names of the contributors, does not make the ordinance unconstitutional. The Constitutional Amendments do not guarantee anonymity at all events. If NAACP wants tax immunity, it should comply with the ordinance. It cannot have immunity from taxation without complying with the ordinance. This is but an application of the old statement that one cannot both eat his cake and keep it. The case of N. A. A. C. P. v. State of Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, affords the appellant no protection in this case. In the Alabama case the prime purpose of the procedure instituted by the Attorney General of Alabama was to obtain information whereby Alabama could force the NAACP out of the State. So the Supreme Court of the United States held that NAACP was not required to disclose against itself. In the case at bar, the purpose of the ordinance is to determine the tax status of one seeking to claim immunity from occupation tax. The ultimate aim in N. A. A. C. P. v. State of Alabama was to stop the activities of NAACP; but in the case at bar, the disclosure of NAACP's list of members and contributors is a mere incident to see if legal taxation is being evaded. The ordinance here under attack does not single out NAACP and require information of it only: rather, the ordinance requires information of all organizations seeking exemption from privilege tax. Other organizations have complied: why should this one have immunity as though it were a favored child?

[*Shuttlesworth Case Discussed*]

The United States Supreme Court has quite recently recognized that a law applicable to all persons is valid, even when attacked by those who disliked the law involved. In the case of Shuttlesworth v. Birmingham Board of Education, D.C., 162 F.Supp. 372, four Negro children sought to test the constitutionality of the Alabama School Placement Law and to enjoin the City Board of Education from enforcing the law. The three-Judge Court, in an opinion by Circuit Judge Rives, held that the Alabama School Placement Law, Laws 1955, p. 492, furnished legal machinery for an orderly administration of the public schools by admission of qualified pupils upon a basis of individual merit, without regard to their race or color, and that the law was not unconstitutional on its face. The case was appealed to the Supreme Court of the United States and that tribunal affirmed the three-Judge Court in a per curiam order of November 24, 1958, saying: "The motion to affirm is granted and the judgment is affirmed upon the limited grounds on which the District Court rested its decision." 79 S.Ct. 221. When we study the decision of the District Court, we see that the Alabama School Placement Law was upheld because there was no showing that it was not being uniformly administered. The same thing is true in each of the ordinances here under attack: there is nothing in the record before us to show that these ordinances were enacted for any purpose other than those stated in the ordinances; and there is no showing that the ordinances are being enforced other than uniformly.

We find no error, and the judgment in each case is affirmed.

HOLT and GEORGE ROSE SMITH, JJ., dissenting.

ORGANIZATIONS
NAACP—Arkansas

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Inc., v. STATE of Arkansas ex rel. Bruce Bennett, Attorney General.

Supreme Court of Arkansas, December 22, 1958, 319 S.W.2d 33, Rehearing denied January 19, 1959.

SUMMARY: The State of Arkansas, in a state court action against the NAACP to collect corporate franchise taxes, moved that defendant be ordered to produce (1) records of the names and addresses of the officers, agents, and employees of defendant and its state conference who are within the state, (2) similar records as to local branches in the state, (3) correspondence, deposit slips, cancelled checks, reports, and publications of defendant and its state conference, and (4) records listing state contributors to defendant and its state conference during the past seven years. The court rejected defendant's contention that such information was privileged under free speech and assembly guarantees, even though it was alleged that if officers and members were identified they might be harassed. However, under item (4) only a statement of the total donations from state people was required. Defendant failing to comply, a default judgment against it was entered, but the court declined to punish it for contempt. On appeal by defendant, the Arkansas Supreme Court affirmed. As to the membership lists being privileged, the court said it did not construe the trial court as requiring the production of the lists in view of the modification made in item (4), which, unmodified, would have included the names of dues-paying members.

SMITH, Justice

This is an action by the State, on the relation of the Attorney General, to collect corporate franchise taxes, in the amount of $50 a year, for the past seven years. The merits of the case were not reached in the court below, as the appellant refused to comply with an interlocutory order requiring the production of certain records and permitted judgment to be entered by default as a means of obtaining a review of the production order.

Four days after the complaint was filed the plaintiff attempted to secure information about the appellant's activities in Arkansas by propounding interrogatories to the president of the Arkansas State Conference of NAACP Branches. The president refused to disclose a substantial part of the information requested, on the ground that it was privileged under the constitutional guaranties of free speech and assembly, Const. art. 2, §§ 4, 6. The plaintiff then asked for an order directing the defendant to produce for inspection (1) records listing the names and addresses of the officers, agents, servants, employees, and representatives in Arkansas of the defendant and of its Arkansas Conference, (2) records listing similar information with respect to the defendant's local branches in Arkansas, (3) records, files, papers, correspondence, deposit slips, canceled checks, reports, and publications of the defendant and its Arkansas Conference, and (4) records listing the persons in Arkansas donating to the defendant and its Arkansas Conference during the past seven years, and the amount received from each.

This motion was resisted on the same ground of privilege. The defendant offered proof to show that if the identity of its officers and members were disclosed they might be subjected to harassment in the form of violence, bombing, the burning of crosses, anonymous telephone calls, and threatening letters. The court found that the requested information was not privileged and granted the plaintiff's motion for production, except that item (4) was modified to require only a statement of the total donations and contributions from Arkansas for the past seven years. As we have indicated, the defendant refused to comply with the order and permitted the entry of a default judgment. The court found that the refusal was not willful and denied the plaintiff's motion that the defendant be punished for contempt.

[*Constitutional Privileges Claimed*]

We need consider only the two points argued by the appellant in its brief, for it abandons other errors by failing to argue them. Connell v. Robinson, 217 Ark. 1, 228 S.W.2d 475. It is first contended that the appellant's membership

lists are privileged under the guaranties of freedom of speech and of assembly. NAACP v. State of Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488. In this particular case this contention is sufficiently answered by the fact that we do not construe the court's order as requiring the production of these lists. That information would doubtless have been available to the plaintiff had the court granted item (4) in the motion for production, for the names of persons donating or contributing to the appellant would have included the names of persons paying dues. But the court refused to order the disclosure of this information, which of course means that it was also excluded from the general language in the rest of the order. The State did not cross appeal from the court's refusal to order that the membership lists be produced.

Secondly, it is said that the plaintiff should have been required to show good cause for the production of the records. Ark.Stats.1947, § 28-356. The record reflects, however, that the parties stipulated and orally agreed that the only issue on appeal would be whether the records are privileged. On the basis of this agreement the chancellor refused to impound the records pending appeal. Hence the appellant is not in a position to question the order on the ground now asserted.

Affirmed.

ORGANIZATIONS
NAACP—Florida

Theodore R. GIBSON, Ruth Perry, Vernell Albury, and Grattan E. Graves, Jr., v. FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE.
Anna ROSENBLATT v. FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE.
Edward T. GRAHAM v. FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE.
Bertha TEPLOW v. FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE.

Supreme Court of Florida, December 19, 1958, Nos. 29,491; 29,492; 29,493; 29,494.

SUMMARY: A 1957 Florida statute authorized the appointment of a legislative committee to investigate "organizations advocating violence or a course of conduct which would constitute a violation of the laws of Florida." 3 Race Rel. L. Rep. 784 (1958). The committee served petitioner, an officer of the NAACP, with a subpoena to produce information pertaining to the NAACP and the Florida Council for Human Relations. Petitioner moved to quash subpoena, but the circuit court refused, which order was sustained by the district court of appeal and the Supreme Court of Florida. The latter court rejected petitioner's contention that the committee had exceeded the authorized scope of inquiry and that the Act creating it was unconstitutional. It was held that the issuance of the subpoena was within the committee's jurisdiction, and that the inquiry did not infringe any constitutional rights of the petitioner. *In re Petition of Graham*, 104 So.2d 16, 3 Race Rel. L. Rep. 724 (Fla. 1958). Early in 1958, the committee subpoenaed persons alleged to be officials and members of the NAACP's Miami branch to produce membership lists and to appear at a hearing. There they were told that the hearing would concern: (1) activities of groups operating in the state in the fields of labor, education, race relations, and "coercive reform of educational and social practices by litigation and pressured administrative action"; and (2) the Communist Party, including its members, activities, and aims, and the degree to which communist influence had infiltrated groups in the enumerated fields. Those summoned declined to produce membership records, and some individuals refused to answer questions as to whether they held NAACP offices, knew named persons (one of whom was alleged to be a NAACP member with communist interests), knew named persons to be communists, and whether they were members of or supported activities for the Communist Party or other named organizations. A state circuit court ordered the witnesses to produce the records and to answer the questions

(except those objected to on the ground of self-incrimination). On appeal, the Florida Supreme Court reaffirmed the constitutionality of the Act and held that the investigation had been legitimately focused on sedition directed exclusively against the state and on the need for constitutional amendment. It was further held that: (1) constitutional protections against self-incrimination could be invoked, since Florida anti-sedition penal statutes were still in force; (2) the requirement that a witness in a legislative investigation hearing be informed in advance as to the nature of the inquiry had been met; (3) all questions propounded were pertinent except those wherein witnesses had been asked if they knew named persons without any attempt having been made to relate those names to a proper subject of the inquiry; (4) witnesses could be required to answer questions about personal connections with the NAACP and to produce NAACP records for certain limited uses, absent evidence that the disclosure of NAACP membership in Florida would deter members from participating in NAACP affairs for fear of retaliation or would be used to try to oust the organization from the state. The judgments were affirmed, except as modification was required as to questions not shown to be pertinent to the committee's inquiry.

THORNAL, J.

We are here confronted by four separate appeals seeking review of a group of orders entered by one of the Circuit Judges of the Eleventh Judicial Circuit. By the orders each of the appellants was directed to appear before the appellee Florida Legislative Investigation Committee on August 11, 1958, and answer certain questions propounded by the Committee or else suffer the penalties of contempt of court with appropriate punishment. Certain appellants were directed to respond to a subpoena duces tecum by producing various records.

We are called upon to determine the nature and scope of the legislative power to investigate, and the pertinency of certain questions propounded to the appellants. We must consider the state and federal constitutional problems presented by a claimed right of privacy and association, and an asserted privilege against self-incrimination.

[*Committee Created*]

The appellee Committee was created by Chapter 57-125, Laws of Florida 1957. In the early part of 1958 the Committee was in the process of conducting an investigation to determine the existence or non-existence of so-called subversive activities in and against the State of Florida. They subpoenaed certain persons including all of the appellants who allegedly are members of the Miami Branch of the National Association for Advancement of Colored People, hereinafter referred to as NAACP. Some of the appellants were officers, others were directors, and others were merely members. The Committee also issued a subpoena duces tecum to certain of the appellants directing them to produce the membership lists, books and records of NAACP. At a Committee hearing held February 26 and 27, 1958, the several appellants declined to answer certain questions for stated reasons which we will discuss later. Those who were summoned to do so likewise declined to produce the membership records of NAACP. In each instance the counsel for the Committee propounded the question, the witness declined to answer it, the Chairman of the Committee directed the witness to answer, and the witness again declined. The Committee itself then approved the action of the Chairman and directed its counsel to petition the Circuit Court for an order compelling answers and directing the production of the membership lists. Section 3, Chapter 57-125, Laws of Florida 1957. Emspak v. United States, 349 U.S. 190, 99 L.Ed.997, 75 S.Ct. 687. The Circuit Judge issued a show cause order to each of the appellants. After a full hearing, the Judge directed the appellants to answer certain questions. He directed three of the appellants to respond to the subpoena duces tecum requiring the production of records. His order provided that upon the failure of the witnesses to answer the questions or produce the membership lists, "then he [or she] shall be in contempt of this court and shall be punished accordingly." The appellants now seek reversal of the orders applicable to them respectively for various reasons hereafter noted.

The contentions of the several appellants vary somewhat according to the nature of the inquiries propounded to them and the reasons given for their refusal to answer. We will discuss these in our consideration of the problems presented by the separate groups of appellants. In addi-

tion we will also dispose of the contention that the membership list of the Miami Branch, NAACP, should not be produced pursuant to the subpoena duces tecum.

BASIC CONSTITUTIONAL PRINCIPLES INVOLVED

The broad but vital principles of constitutional law asserted by the appellants will require cautious analysis when related to the situation presented by these appeals. We are currently passing through what appears to be a period of transition in the application of established constitutional principles. While vocally expressing adherence to the biblical admonition that we "remove not the ancient landmark[s]", Deuteronomy 19:14, some admittedly sincere jurists, with the support of many equally sincere political scientists, have, in our view, undertaken to transplant many of the ancient landmarks of constitutional law. The result we think has been an application of these traditional concepts to situations for which they were never intended or, in other respects, a failure to apply them to situations for which they were intended.

[*Early Documents*]

In our effort to resolve some of these difficult and troublesome constitutional problems, we have reminded ourselves that it might be well to note the admonition of Section 15, Declaration of Rights of Virginia, which antedated our Declaration of Independence. In the cited document, the author George Mason, who was regarded as one of the most astute and farsighted of the architects of our government, suggested:

> "XV. *That no free government,* or the blessing of liberty, *can be preserved* to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and *by frequent recurrence to fundamental principles.*" (Emphasis added.)

In similar fashion the authors of the Declaration of Rights of Massachusetts in Section 19 of that document stated:

> "A *frequent recurrence to the fundamental principles of the constitution,* and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, *are absolutely necessary to preserve the advantages of liberty, and to maintain a free government.*" (Emphasis added.)

In recurring to certain fundamental principles the instant record invites our attention to two concepts of our constitutional democracy which we deem basic to our consideration of the problems presented and the ultimate solution thereof.

[*Basic Principles*]

The first of these simply is that under the Bill of Rights incorporated in the Constitution of the United States, an individual citizen, regardless of race or creed, is entitled to enjoy certain inalienable rights which cannot be denied to him except in a proper case by due and orderly process of law. While recognizing the rights of the individual, we must of necessity at times reconcile the enjoyment of those rights with the sovereign prerogatives of the state. If and when the two come into conflict in a particular case, it often becomes a judicial responsibility to determine which shall be subordinated to the other under controlling provisions of the organic law.

The second basic principle to which we must here recur is a recognition of those aspects of our governmental structure which have produced a federalism of separate states. Consistent with the above mentioned tendencies in some quarters, we deem it appropriate to recall that American federalism is a co-ordinate union of divided sovereignties. E pluribus unum. If it be true, as our own State Constitution reminds us, that "All political power is inherent in the people", Section 2, Declaration of Rights of Florida, it is equally fundamental that the powers enjoyed by the federal government are those only which are specifically defined in the Constitution of the United States supplemented by those powers essentially implicit in the ones specified. In equal measure powers not so delegated to the federal government nor prohibited to the states were, by the Tenth Amendment to the Constitution of the United States, expressly reserved to the respective states or to the people thereof. It might be well to recall that the Fedral Constitution was ratified by conventions of the individual states as separate sovereignties representing the people of each particular state. Madison, Federalist 39. At no time did the people of all of the states as one composite nationwide electorate ever pass on the organic document. See also Florida Law Journal, Vol. XVIII, No. 3, p. 65, "Counter-Revolution—An Estimate of the Situation" by R. C. Alley.

In approaching our discussion of the legal

questions presented by the instant record, we do so in the belief that certain tendencies toward paternalistic nationalism, which we think we detect in the opinions of some courts and the philosophies of some leaders of government, are, in our humble view at least, inconsistent with these traditional concepts of our constitutional democracy.

[*John Marshall Quoted*]

Rather than call upon the pristine exponents of the concept such as Jefferson, Madison, Mason and others of their colonial political persuasion, let us look to the most consecrated judicial advocate of centralized nationalism. In Barron v. Baltimore (US) 7 Pet. 243, 250, 8 L.ed. 672, 675, Chief Justice John Marshall wrote:

> "But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. *In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.*" (Emphasis added.)

[*Frankfurter Quoted*]

Spanning the gap of more than one hundred years, in 1958 Mr. Justice Frankfurter expressed the views of the majority of the highest court of the land when in Knapp v. Schweitzer, 357 U.S. 371, 2 L.Ed (2d) 1393, 78 S.Ct. 1302, he wrote:

> "It is relevant to remind that our Constitution is one of particular powers given to the National Government with the powers not so delegated reserved to the States or, in the case of limitations upon both governments, to the people. Except insofar as penal remedies may be provided by Congress under the explicit authority to 'make all Laws which shall be necessary and proper for carrying into Execution' the other powers granted by Art 1, Sec. 8, the bulk of authority to legislate on what may be compendiously described as criminal justice, which in other nations belongs to the central government, is under our system the responsibility of the individual States."

We submit that we are not without respectable support for our view.

As we proceed now to a more detailed discussion of the problems at hand we remain fully conscious of the rights of appellants as citizens. These must be reconciled with any conclusion regarding the extent of the State's power to act. We must also consider the effect of certain decisions bearing on the State's authority when equated with the power of the federal government. In all of these involved deliberations, we must admittedly evaluate the influence of the authoritative voice of the Supreme Court of the United States in its interpretation of the federal organic law. All of this we now undertake.

FACTUAL BACKGROUND

The factual situation giving rise to these appeals falls logically into several distinct categories with regard to the various appellants. We summarize them as follows:

APPELLANT RUTH PERRY

The principal questions which appellant Perry was directed to answer involved interrogations as to: whether she was then vice-president of the Miami chapter of the NAACP; whether she was then the secretary of the Florida Conference of NAACP; whether she knew various specifically named people. One particular question in the latter category should be pointed up in detail. The Committee counsel asked the witness, "Do you know a man named Arlington Sands?" Counsel thereupon explained to the witness that on the preceding day one of the witnesses before the Committee had testified that Arlington Sands had been seen by him at Communist Party meetings in Miami and that he also knew him as a member of the Miami Branch of NAACP. The witness Perry also refused to produce the membership list of the Miami Branch of NAACP although the subpoena duces tecum served upon her directed her so to do. The trial judge ordered appellant Perry to answer these various

questions. Her objections to answering them were incorporated in a written statement which she filed with the Committee. The sum of her objections were that Chapter 57-125, Laws of Florida 1957, which created the Committee and defined its authority, abridged rights guaranteed to her by the First and Fourteenth Amendments to the Constitution of the United States, Sections 12, 13, 15 and 22 of the Declaration of Rights of the Constitution of Florida, Article II, and Section 16 of Article III, of the Florida Constitution. She objected further to producing the membership lists of the NAACP on the ground that the demand for this list constituted an invasion of her rights to due process of law, freedom of speech and association, and the corresponding rights of the NAACP.

APPELLANTS GIBSON AND ALBURY

When appellants Gibson and Albury separately appeared before the appellee Committee, admittedly in response to the subpoena served upon them, they were interrogated as to whether they had brought the requested membership lists of the NAACP. Each of these appellants thereupon read a prepared statement denying any affiliation with the Communist Party but refusing to answer any questions propounded by the Committee on the stated ground that in their view the Committee had demonstrated an antagonistic prejudice toward all the witnesses to the end that it had disqualified itself to conduct an impartial investigation. These witnesses then positively refused to submit to any questioning.

APPELLANT GRATTON E. GRAVES, JR.

This witness identified himself as the Miami Attorney for NAACP. He refused to produce any records of the NAACP on the grounds that it would require a breach of confidential relations with his client in violation of his constitutional rights of privacy and freedom of association and a lack of pertinency to the subject under investigation. He denied, however, that he had custody of any records. For similar reasons he declined to answer inquiries as to assurances which he gave the Committee at a prior hearing that the records of NAACP had been sent to New York and that he would undertake to obtain them. Appellant Graves refused also to answer inquiries as to whether he knew one Anna Rosenblatt, Edward T. Graham, Bertha Teplow, or Theodore R. Gibson. He also declined to answer inquiries as to his acquaintance with numerous other people. For the reasons above summarized he refused to identify the whereabouts or custodian of the records called for by the subpoena served upon him. The trial judge directed this witness to answer these various inquiries or else suffer the penalties of contempt.

APPELLANTS ROSENBLATT AND TEPLOW

These witnesses were interrogated as to their place of birth; whether they were naturalized citizens of the United States; whether they were members of the Communist Party of Florida; whether they knew various individuals and whether they knew them to be members of the Communist Party; whether they were members of the NAACP in Dade County; whether they were members of such organizations as Southern Conference for Human Welfare, Civil Rights Congress, or the American-Hungarian Culture Club. They objected to answering this line of questioning on the grounds that it was not pertinent to the subject of the legislative inquiry; that it invaded their rights protected by Sections 1, 2, 12, 13 and 15 of the Declaration of Rights of the Florida Constitution, and the First, Fifth and Fourteenth Amendments to the Constitution of the United States. With reference to the questions as to whether the witnesses were affiliated with the Communist Party or had engaged in official activities for the Communist Party in Florida, the trial judge apparently held the view that Chapter 876, Florida Statutes, condemning subversive or seditious conduct against the State of Florida, remains a valid enactment despite the opinion of the Supreme Court of the United States in Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640. Therefore, he ruled that these witnesses could decline to answer these specific questions on the constitutional ground that by doing so they would be compelled to incriminate themselves contrary to Section 12, Declaration of Rights of Florida. The other types of questions the witnesses were required to answer.

APPELLANT GRAHAM

After the filing of our opinion and mandate in the matter of In re Petition of Edward T. Graham, Fla. 1958, 104 So.2d 16, the trial judge directed Graham to appear before the appellee Committee and answer the questions which he had theretofore declined to answer. In the in-

stant appeal Graham has again declined to answer the questions on the ground that since the filing of our mandate in the prior matter, the Supreme Court of the United States has announced its decision in National Association for Advancement of Colored People v. State of Alabama, ex rel. John Patterson, 357 U.S. 449, 2 L.Ed. (2d) 1488, 78 S.Ct. 1163. It was his position before the trial judge and is his position now before us that the last cited opinion of the United States Supreme Court in effect overrules and supplants our prior decision in the Graham matter to the extent that he should not be required to produce any membership lists or divulge the membership of the NAACP. The trial judge ruled otherwise.

CONSTITUTIONALITY OF STATUTE CREATING COMMITTEE

The appellee legislative Committee was created by Chapter 57-125, Laws of Florida 1957. The powers and duties of the Committee are delineated in Section 2 of the cited statute, which reads as follows:

> "It shall be the duty of the committee to make as complete an investigation as time permits of all organizations whose principles or activities include a course of conduct on the part of any person or group which would constitute violence, or a violation of the laws of the state, or would be inimical to the well-being and orderly pursuit of their personal and business activities by the majority of the citizens of this state. Such investigations shall be conducted with the purpose of reporting to this legislature of the activities of such organizations to the end that corrective legislation may be adopted if found necessary to correct any abuses against the peace and dignity of the state."

Although the constitutionality of the statute is assaulted by the appellants, we think we adequately disposed of this contention by our opinion in In re Petition of Edward T. Graham, etc., supra. There, the same Graham who is presently an appellant had sought to quash a subpoena duces tecum requiring him to produce the books, records and membership lists of NAACP. We sustained the act against an assault on its constitutionality. We now re-affirm our view that the act is constitutional. In our former order we affirmed the trial judge when he denied a motion to quash the subpoena on the ground that Graham's objections because of alleged lack of pertinency to the subject of the inquiry authorized by the statute were premature. We held that it would not be possible to determine whether the subject inquiry would violate his constitutional rights until we were confronted by the actual questions to be propounded.

LEGISLATIVE POWER TO INVESTIGATE

It has long been recognized that a legislative body has the power to conduct investigations in order to obtain information on subjects of legislation. Implicit in the power to legislate is the authority to seek out and acquire needed information in the rightful exercise of that power. This may be done through duly constituted committees. Compulsory process is a procedural incident to obtaining the information. McGrain v. Daugherty, 273 U.S. 135, 71 L.Ed. 580, 47 S. Ct. 319. Once a valid legislative objective is established then the power of inquiry with effective process to obtain it is an essential concomitant of the legislative authority to act. We here inject the warning that this is not an unbridled power of government. Moderation, restraint and caution should be the rule in exercising it. If not circumscribed by reasonable limitations it is one which could lead to abuses with attendant encroachments on individual liberties. The privilege should never be sadistically employed as a media to "hunt witches." It should never be exercised merely for the sake of disclosure to the detriment of the citizen under interrogation. Legitimate legislative action is the ultimate objective and the prime justification for the inquiry.

We find in this record no evidence whatever that the appellee Committee has in any fashion abused its powers or undertaken to embarrass the appellants merely for the sake of arbitrary disclosure. In actuality the counsel for the Committee publicly announced that no inferences adverse to any of the witnesses should be drawn merely from the fact that they were subpoenaed. He made it clear that the fact that a witness was called should not be construed as a suspicion of his disloyalty. At the opening of the hearing the Chairman of the Committee clearly delineated by an opening statement the reasons for and the subject of the inquiry. His statement is sum-

marized in more detail hereafter. He did this in order to enable the witnesses to determine the pertinency of the questions propounded to them. Chapter 57-125, supra, was read in its entirety. It was made clear throughout the hearing that the NAACP, as an organization, was not considered in and of itself to be associated with the Communist Party. It was pointed out that the purpose of the inquiry was to determine whether members of the Communist Party or fellow travelers had so surreptitiously penetrated and infiltrated the NAACP, as well as other legitimate organizations, as to justify state action on the subject. There can be no doubt, therefore, that all of the witnesses were fully informed as to the subject of the inquiry.

We come next to determine the essential question as to whether the inquiry was being conducted to obtain information to support legitimate legislative objectives. In other words, could the information sought by the Committee be employed by the Florida Legislature as a basis for enacting laws or pursuing other proper legislative action?

STATE CONTROL OF SEDITION

The appellants objected to the pursuit of the investigation by the Committee on the ground that the Florida Legislature had no authority to enact the enabling statute. They further contended that the subject of the inquiry announced by the Chairman was not within the power of the State of Florida to pursue. These contentions were based on the theory that the inquiry was aimed solely toward the investigation of seditious persons, organizations and conduct. They then assert that in Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640, the Supreme Court of the United States has held that by the passage of the so-called Smith Act, 18 USC Section 2385, the Congress of the United States has pre-empted the entire field of control and prevention of sedition and the prosecution of seditious conduct. On this reasoning appellants conclude and ask us to agree that the State of Florida is now powerless to control or prevent seditious conduct against the government of the State, the infiltration or penetration of subversive and seditious persons into the community life of the state or into legitimate organizations such as NAACP, which otherwise enjoy the protection of the laws of the state, or in any fashion to direct the exercise of the State's lawmaking powers against these or similar activities.

On this point we are of the view that there is no controlling authority and we are frank to state at the outset that if such is to be the law of Florida, some other court will have to exercise the dubious privilege of announcing it. We do not accord to the opinion of the highest court in the land in Commonwealth of Pennsylvania v. Nelson, supra, the broad comprehensive sweep that is contended for it by the appellants and even conceded by the briefs of the appellee Committee. Admittedly, that decision has been the subject of much comment and some adverse criticism. See Report of Committee on Federal-State Relationships, Conference of Chief Justices, August 23, 1958. In support of the decision see remarks of Chief Justice Charles Alvin Jones of Pennsylvania filed with the Conference on the same date.

[*State Court Decisions*]

The Supreme Courts of some states have taken the position that the Nelson decision determined that by the passage of the Smith Act, Congress has pre-empted every aspect of the field of controlling seditious conduct, even when directed against a particular state. Cf. Albertson v. Millard, 345 Mich. 519, 77 N.W.2d 104; Braden v. Commonwealth, — Ky. —, 291 S.W.2d 843. Illustrative of a more limited interpretation of the Nelson opinion is Commonwealth v. Gilbert, 334 Mass. 71 134 N.E.2d 13. There, the Supreme Judicial Court of Massachusetts held that because of the Nelson case an indictment charging advocacy of the violent overthrow of the government of Massachusetts would have to be quashed on the theory that Congress had pre-empted the field. The Massachusetts court, however, expressly stated that in its view there could be some kinds of sedition directed so exclusively against the state as to fall outside the scope of Commonwealth of Pennsylvania v. Nelson, supra.

In State v. Diez, Fla. 1957, 97 So.2d 105, we ourselves have previously taken note of the Nelson decision. As against the identical contention now submitted by these appellants, we upheld Section 786.22, Florida Statutes, requiring a so-called Loyalty Oath as a condition to public employment in this state. We there pointed out and we here repeat for emphasis that in the

Nelson case the State of Pennsylvania had indicted Nelson for advocacy of the violent overthrow of the government of the United States contrary to the Pennsylvania statute. See Commonwealth v. Nelson, 377 Pa. 58, 104 A.2d 133. Nowhere in the charges against Nelson were there any allegations of seditious conduct against the state. The decision of a court must necessarily be read in the light of the factual situation which produces it. In the Nelson case the Supreme Court of the United States was confronted solely and entirely with the charge of seditious conduct against the United States in violation of a state statute. It is inconceivable to us that the decision could or should be given controlling effect in situations which were not even remotely before the Supreme Court of the United States when its decision was rendered. We certainly respect the authoritative effect of the Nelson decision to the extent that it holds that Congress has pre-empted the field of controlling sedition against the government of the United States. Under all recognized bases for interpreting and construing judicial decisions, we do not feel compelled to accord to the Nelson opinion a more comprehensive or far-reaching effect.

[Nelson *Not Controlling Here*]

We adopt this view simply because we are not persuaded by Nelson or any other decision that the virility of the states to cope with purely internal problems can be reduced to a condition of impotency by any astute process of judicial sterilization.

By Chapter 876, Florida Statutes, the Legislature of this state has undertaken to prohibit and control any conduct that would lead to the forceful or violent overthrow of the state government. The statute makes illegal the assembly in Florida of two or more persons having as their purpose the promotion or advocacy of such conduct. It appears to us that it would be unthinkable to hold that a state legislature is powerless to prohibit such conduct or the holding of such assemblies within the geographical confines of the state itself.

By Chapter 28221, Laws of Florida 1953, commonly known as the subversive activities law, Sections 876.22 - 876.30, Florida Statutes, the Legislature of Florida has undertaken to define various subversive organizations. It has prohibited the establishment of such organizations in this state and has proscribed the defined subversive conduct with criminal penalties as the punishment for violation.

To the extent that such statutes proscribe conduct which is inimical to the welfare of the people and the government of this particular state, the Florida Legislature has exercised a legitimate state function. Our search reveals no controlling precedent to the contrary.

OPENING STATEMENT OF CHAIRMAN

At the outset of the hearings involved in this matter the Chairman of the Committee informed all of the witnesses collectively, including the appellants, that the Committee would concern itself with the activities of various organizations operating in Florida in fields of race relations, the coercive reform of educational and social practices by litigation and pressured administrative action, in the field of labor, education and other phases of life within the state. He told them that to this extent the Committee would concern itself with the Communist Party, its members, its activities, its aims and objectives and the degree, if any, to which Communists and Communistic influences had successfully penetrated or infiltrated various organizations operating in the fields of endeavor which he had previously summarized. Admittedly NAACP is an organization active in the area of race relations. The announced purposes of the Committee inquiry were well within the orbit of the authorizing statute and likewise within the power of the State of Florida to accomplish.

In addition the Committee points out in its brief that aside from any question of pre-emption of control of seditious activities by the Congress, every state has a right to instigate and inaugurate a process for amending the United States Constitution provided it can succeed in obtaining the agreement of the Legislatures of two-thirds of the states. Article V, Constitution of the United States. Under the cited Article of the Federal Constitution, whenever the Legislatures of two-thirds of the states petition the Congress so to do, it is bound to call a Convention for proposing amendments to the Constitution of the United States which amendments shall be subject to subsequent ratification by the Legislatures of three-fourths of the states. Here, we think, the appellee-Committee correctly reasoned that the Florida Legislature has

the right to inform itself of the existence or non-existence of the sedition described in order to exercise a proper legislative function. That function is to determine whether the Legislature of Florida deems it wise to institute a movement among the several states to obtain the accord of at least two-thirds of them on an application to the Congress to set in motion the amending procedure. Here again we find a perfectly legitimate area of legislative activity that justifies the pursuit of the investigation under review.

SELF-INCRIMINATION

The trial judge was of the view, as we are, that Commonwealth of Pennsylvania v. Nelson, supra, did not eradicate the subversive activities statutes of the State of Florida insofar as the State itself is concerned. In logical accord with this view he held that when certain of the appellants declined to answer questions regarding their affiliations with the Communist Party on the ground that such answers would tend to incriminate them contrary to the protective provisions of the Fifth Amendment to the Constitution of the United States and Section 12 of the Declaration of Rights of the State of Florida, they were entitled to refuse to answer for the asserted reason. Inasmuch as we have approved the ruling of the trial judge to the effect that the Florida subversive control statutes remain effective and inasmuch as these statutes prescribe criminal penalties for violation, we must in turn affirm his ruling to the effect that the witnesses who were interrogated with reference to their own personal Communistic activities could legitimately assert the protective provisions of Section 12, Declaration of Rights of Florida. In this connection we observe in passing that if it were held that the Congress has preempted the entire field to the extent that the Florida Statutes against sedition and subversive conduct are no longer effective, then, of course, Section 12 of our Florida Declaration of Rights would offer no defense against answering these particular questions. Similarly, we have the view that under such a holding the Fifth Amendment to the Constitution of the United States would offer no barrier to State action for the simple reason that there is not here apparent any semblance of an imminent danger of Federal prosecution as a result of the State action.

The rule appears to be reasonably well settled that the Fifth Amendment to the Federal Constitution is a limitation only on Federal action. It does not restrict State action, absent the presence of an impending or imminent Federal prosecution as a result of the action by the State. Knapp v. Sweitzer, 357 U.S. 371, 2 L.Ed. (2d) 1393, 78 S.Ct. 1302; Lorenzo v. Blackburn, Fla. 1954, 74 So.2d 289. Admittedly, to many, this constitutional guarantee against compulsory self-incrimination is little understood and seldom justified in application. We agree that it is rapidly becoming a burden on the American political and judicial conscience to reconcile our organic guarantees of freedom, of which this is one, with the demanding necessity of ferreting out and bringing to proper justice many of our own citizens whose lack of civic conscience permits them to betray the very freedoms which they claim as their protective armor against the purifying glare of public inspection. The fact remains, however, that both the State and Federal Constitutions establish the right. The court has no power to tamper with either document. If a change is made the people will have to make it.

PERTINENCY

The next assult on the various questions which appellants were ordered to answer and which are summarized above is based on their contention that the questions lacked pertinency to the subject of the inquiry. To support this contention we are referred to the decision of the Supreme Court of the United States in Watkins v. United States, 354 U.S. 178, 1 L.Ed. (2d) 1273, 77 S.Ct. 1173. It is true that the Watkins decision announced the rule that the questions propounded in a legislative investigation should be pertinent to the subject of the inquiry. It affirms the position, which we have previously announced, that the subject of the inquiry should be made sufficiently clear and definite to inform a witness of the nature of the matter under inquiry. This is so in order to enable the witness to determine the pertinency of any particular question as well as to evaluate his privilege of declining to answer if such is available. The subject of the inquiry should not be afflicted with the so-called "vice of vagueness" thereby depriving the witness of his constitutional rights while under interrogation. In the Watkins case the Supreme Court suggested several methods by which this "vice of vagueness" can be avoided. One is by the authorizing statute or resolution

which establishes the Committee and so clearly defines the subject under inquiry that a witness can understand the pertinency of questions propounded to him. A second method is by an "opening statement" by the Chairman of the Committee outlining in detail the subject of the inquiry. This assumes, of course, that the subject of inquiry announced by the Chairman is within the orbit of authorized investigation provided by the enabling statute or resolution. Furthermore, in Watkins the majority pointed out that while purportedly that investigation was dealing with subversive activities in the field of labor, actually many of the witnesses had nothing to do with the labor movement. Here the contrary appears as to members of NAACP.

We find no difficulty in holding that the questions which the trial judge directed the witnesses to answer were in most instances clearly pertinent to the legitimate subject of the inquiry. We will later point out the limited exceptions to the order. Chapter 57-125, supra, the enabling statute, in itself, with reasonable clarity outlined the nature of the investigation. This was supplemented by a positive, clear-cut delineation of the purpose of the inquiry made by the Chairman of the Committee at the outset. Rather than being afflicted with the "vice of vagueness" in this instance, we think that both the enabling statute and the opening statement of the Chairman clearly defined the purpose and scope of the inquiry. Subject to an exception we shall mention we have the view that the questions here involved were pertinent to the authorized inquiry.

COMMITTEE PREJUDICE

The witnesses Gibson and Albury declined to answer any questions or produce any documents on the ground that the Committee had demonstrated a prejudice that precluded its members from sitting in impartial deliberations over the hearing. They base this contention on statements made by two Committee members at the conclusion of the appearance of the witness Perry. The sum of these statements simply was that in the opinion of one of the Committee members, the witness had been evasive; that she had refused to supply information that would enable the Committee to be of subsequent service to the state; that in so doing she was rendering a great dis-service to the organization of which she was a member as well as to the citizens of Florida. The remarks concluded with the observation that in the opinion of the Committee member the attitude of the witness "is a disgrace". These observations culminated in a motion that counsel for the Committee be directed to prepare procedures to cite the witness for contempt. Another Committee member echoed similar sentiments and seconded the motion. When the witnesses Gibson and Albury subsequently appeared before the Committee pursuant to summons, they refused to answer any questions with their contention that the Committee was biased, prejudiced and unfair. These two appellants cite no authority to support them in their refusal to respond to questioning.

In the first place as we read the remarks of the two members of the Committee we find in them nothing that indicates a bias or prejudice against the complaining appellants or as a matter of fact against the witness to whom they were directed. Our examination of this record suggests that several of these recalcitrant and sometimes defiant witnesses including appellant Perry consistently challenged the authority of the Committee and clearly displayed a policy of complete non-cooperation. We conclude that the witnesses had a perfect right to assert their various constitutional privileges which they deemed to be available. They have the same privilege here. At the same time we are not aware of any constitutional privileges that authorize one so conditioned to defy, berate, or otherwise arbitrarily challenge a duly constituted authority in the exercise of a lawful power. This record sustains the further notion that this. Committee and its counsel have throughout this proceeding personified a degree of patience and composure customarily demanded only of judicial officers. For this they are to be commended. The sum of these observations is simply that the two appellants Gibson and Albury have tendered no genuine ground whatsoever for reversal.

NAACP MEMBERSHIP LIST

We now approach the contention of the appellant Graham and others with regard to the requirement of the subpoena duces tecum directing them to produce the books, records and membership lists of NAACP. The complaining appellants have produced no records whatsoever. In fact, they admitted at the hear-

ing that they did not bring any of the required records nor did they account for the whereabouts of the records. They have refused to do either. They have objected particularly to the production of the membership lists showing the names of members of the Miami Branch of NAACP. We have the view that the other records are of no material consequence here. They contend here that the order of the trial judge requiring them to respond to the subpoena by the production of such membership lists is directly contrary to the decision of the Supreme Court of the United States in National Association for Advancement of Colored People v. State of Alabama, ex rel. John Patterson, Attorney General, ____U.S. ____, 2 L.Ed. (2d) 1488, 78 S.Ct.____, hereafter cited as NAACP v. Alabama. The decision last cited was rendered subsequent to our decision In re Petition of Edward T. Graham, etc. Fla. 1958, 104 So.2d 16. Appellants contend that the effect of our former decision in the Graham matter has been superseded by the decision of the United States Supreme Court in NAACP v. Alabama, supra. In support of their position that they should not be required to produce the membership lists of the Miami Branch of NAACP, these appellants contend that the freedom to engage in a legitimate association for the advancement of beliefs and ideas is an aspect of liberty guaranteed to them by the due process clause of the Fourteenth Amendment to the Constitution of the United States. It is their position that freedom to associate with those of kindred minds for the advancement of legitimate beliefs and ideas it related to the constitutional guarantee of freedom of speech. It should not be curtailed, so they assert, absent some showing of a compelling state interest that justifies the subordination of the individual liberty to the essential requirements of the welfare of the state.

They further assert that in view of the nature of NAACP as an organization devoted to the advancement of the educational, social and economic well-being of the Negro, they occupy, so they contend, a relatively unpopular position in some sections of the country, including Florida. In view of the alleged lack of popularity of the organization itself, as well as its objectives, these appellants then follow with the assertion that the compulsory production of their membership lists revealing the names of their "rank and file members," many of whom earn their living in various menial pursuits, would be to deter such members from participating in the affairs of the organization, from exercising the right to associate and express themselves on the objectives of the organization, and in a measure would result in economic repercussions such as discharge from employment merely because of affiliation with NAACP.

[*NAACP v. Alabama Distinguished*]

We interpolate that unlike the situation presented in NAACP v. Alabama, supra, the appellants here have not demonstrated by any evidence whatsoever that the production of their membership lists or the identification of members would have such a deterrent effect in the State of Florida. With reference to the attitude of the people of Florida regarding NAACP suffice it to observe that we judicially know from our own records and otherwise that NAACP has actively engaged in the pursuit of its objectives openly, aggressively and without let or hindrance in the State of Florida. The record here presented reveals nothing to the contrary.

In NAACP v. Alabama, supra, the United States Supreme Court was presented with a situation in which the State of Alabama, acting through its Attorney General, was undertaking to oust NAACP from engaging in any intrastate activities because of its failure to comply with the Alabama foreign corporation registration statute. The statute required such a corporation to file its corporate charter and designate a place of business and agent to receive service of process in the State of Alabama. In the Alabama case NAACP complied with all requirements such as the furnishing of its business records, a copy of its charter, the statement of its purposes, the name of all of its officers and directors, the total number of members within the state and the the amount of its dues. They declined to furnish the membership lists which in actuality does not appear to have been a requirement of the Alabama statute. Apparently the list of members was requested merely to attempt to ascertain whether NAACP was engaging in an intrastate business in Alabama. As pointed out above, evidence was presented that satisfied the Supreme Court of the United States that the furnishing of the membership lists would have a deterrent effect upon the exercise of the constitutionally protected right of association as-

serted by the corporation in behalf of its rank and file members. We pretermit any discussion of the fact that in these appeals NAACP as a corporate entity is not a party.

[*Compelling Reason Required*]

In addition to recognizing the existence of this individual right as well as a guarantee of its protection by the due process clause of the Fourteenth Amendment, the Supreme Court of the United States in the Alabama case held in sum that in the particular proceeding there involved the interest of the state in obtaining the list of members was not of sufficient compulsion to override the deterrent effect asserted by NAACP. Constitutionally speaking the ultimate conclusion simply was that in order to justify the restriction on the exercise of the individual right to associate, due process under the Fourteenth Amendment requires that the state exhibit a compelling reason motivated by the general welfare.

We do not undertake to question the authoritative effect of the Alabama decision. Admitting for the matter at hand the controlling aspects of the Federal Constitution as interpreted by the Supreme Court of the United States in that case, we have the view that the instant case does not fall within the prohibitive adjudications of that pronouncement. Here, there is no showing whatsoever of the contended deterrent effect. No effort was made to demonstrate it in any evidentiary form. We are here confronted by the bald assertion of the described constitutional privilege of association with no demonstration of infringement as a result of the attempted state action. Furthermore, in the instant case the purpose of the inquiry as authorized by the enabling statute and as delineated by the Committee Chairman certainly, in the absence of any showing to the contrary, tenders a compelling reason in the public interest to conduct the investigation and to require the availability of the requested records as hereafter announced.

[*Tenth Amendment*]

We have previously concluded in this opinion that the State of Florida is acting within the orbit of the powers saved to it by the Tenth Amendment when it undertakes to explore the membership of various organizations, legitimate perhaps within themselves but suspected of being the victims of surreptitious infiltration and penetration by subversives and others engaged in illegitimate activities.

Assuming, therefore, the legitimacy of the state objective and the controlling justification grounded in the public interest, we have the view that the action of the appellee Committee in the instant case in demanding that certain officers or custodians of NAACP have available at the hearing the membership records of the organization, accords with the requirements of due process within the specifications announced by the Supreme Court of the United States in National Association for Advancement of Colored People v. State of Alabama, supra. As we pointed out In re Petition of Edward T. Graham, supra, we cannot determine from this record the actual pertinency or necessity of revealing the entire membership lists of NAACP to the extent that the entire lists should be delivered to the Committee and placed in evidence thereby becoming a matter of public record. To support the position of the appellee Committee in contending for the production of the records, its counsel points out in his brief that other testimony before the Committee reveals the names of more than one hundred individuals who are, or are suspected of being, active Communists. It is asserted that the same persons are suspected of being members or participants in the affairs of the Miami Branch of NAACP. It is then contended that it is necessary to inspect the entire membership lists in order to determine whether such allegedly subversive individuals are in fact members of NAACP. Admittedly, the appellee Committee is investigating only subversive infiltration of the organization. Consequently, the entire contention of appellee on the subject of pertinency on this particular point is limited to the sole proposition of ascertaining whether certain known or suspected Communists or subversives are in any way affiliated with the activities of NAACP. In view of this position of the appellee, the limitations of the requirement of pertinency would restrict their exploration of the membership of the organization to obtaining from the officers or custodians of the membership lists a statement under oath as to whether such suspect persons are in any way associated with NAACP based upon such custodian's reference to the available membership lists or other means of answering the inquiry, such as, having seen such suspected person at meetings of NAACP. Such procedure, we think, accords due regard to the

pertinency requirements of Watkins v. United States, supra, as well as the due process requirements of National Association for Advancement of Colored People v. State of Alabama, supra. There may, of course, be other pertinent reasons for obtaining the names of officers, directors and particular members of Miami Branch, NAACP, but pertinency would have to be demonstrated when the inquiry is made.

[*Questions on NAACP Membership*]

Similarly, and for identical reasons, we think the trial judge ruled correctly in requiring the various appellants to answer the questions as to whether they themselves were members of NAACP at the time of the inquiry. Conceding the legality of the association and admitting, as the Committee's counsel publicly announced, that no stigma attached merely from membership and further granting to appellants their own contention that their objectives were of the highest, it would be difficult for us to agree that there is constitutional justification for their refusal to answer whether or not they are members. Certainly, this must be the rule in view of the state of this record which fails to disclose any factual basis for a conclusion that the giving of an answer to such questions would result in an illegal invasion of their constitutional right of association.

In accord with the same point of view, but recalling that we have previously affirmed the ruling of the trial judge that certain appellants could employ the cloak of Section 12 of the Declaration of Rights of Florida against answering specific inquiries in regard to their own Communistic activities, we can see no reason why a particular witness who has been properly identified as an officer or member of NAACP should be excused from answering an inquiry as to whether a person who has been otherwise identified with the Communist Party or Communistic activities is a member of NAACP or has participated in its meetings. In this regard we have the view that merely because one knows a Communist, or happens to have been in the company of a Communist, does not convert him into a Communist. Most of the appellants have filed statements affirmatively disclaiming even the remotest personal association with the Communist movement. There is nothing before us which suggests an effort to adjudicate their guilt by association contrary to their own protestations of absolute innocence.

Holding as we have that the legislative objectives of the Committee are legitimate, we think the appellee is within its authority to ascertain whether particular organizations operating in the fields mentioned in the Chairman's opening statement have been afflicted by Communist or subversive infiltration. Illustrative of the type of questioning we here have in mind is the inquiry propounded to the appellant Perry when she was asked by Committee counsel. "Do you know a man named Arlington Sands," the question being accompanied by a statement of counsel that on the preceding day another witness before the Committee had identified Sands as one seen by him in Communist Party meetings in Miami and known by him to be a member of the Miami Branch of NAACP. We deem such a question appropriate even though Sands himself, under oath, denied membership in the Communist Party.

ATTORNEY-CLIENT RELATIONSHIP

Appellant Gratton E. Graves, Jr., who was admittedly attorney for Miami Branch of NAACP was interrogated as to whether he had brought with him certain records of the Association including the membership lists as required by the subpoena duces tecum. He responded that he had not and further stated under oath that he did not have custody of the records. He was then subjected to a line of interrogation as to whether on a previous hearing conducted by the immediate predecessor Committee of the appellee he had testified under oath that he had sent these records to the New York headquarters of NAACP and that he would make a good faith effort to obtain their return to Florida. He was asked whether he had made any such effort and was questioned as to the then-present custodian of the records. He declined to answer any of these questions asserting that an answer would require revealing confidential information obtained by him in his relationship as attorney for his client, Miami Branch of NAACP. On the contempt citation the trail judge overruled the objection and directed a response.

We need not concern ourselves on the failure of the witness Graves to produce the records for the reason that he stated under oath that he did not have them. As to the questions regarding his prior testimony before the predecessor Com-

mittee and the assurances which he then gave as a witness under oath, we see no basis for excluding answers because of the attorney-client relationship. This is so because of the fact that the witness had already testified as to the then-whereabouts of the records, as to his part in transferring the records out of the state and as to the effort that he would make to obtain their return. These questions merely referred back to the prior testimony which was a matter of record and obviously did not involve confidential communications between attorney and client. On the contrary they involved communications between the witness and the Committee. Bearing in mind that we are not here concerned with any problem of requiring an attorney to reveal a communication that would incriminate his client, we think that it was appropriate to require the witness to respond to the questions as to the present custodian of these records. Inasmuch as we have held that any of the appellants who might be custodians of records would be required to have them available at the hearing, we think it would be illogical to hold that any such custodian could turn these records over to the attorney for the Association to enable the attorney in some fashion to secrete the records and thereby place them beyond the power of the state in a proper proceeding to obtain information as to their whereabouts. The records here sought were not the work-product of the attorney's preparations to represent his client. See Atlantic Coast Line Railroad Company v. Allen, Fla. 1949, 40 So.2d 115. We have here documents belonging to the client which should be produced if they were in the custody of the client but which an attorney apparently endeavors to conceal by transferring them to the custody of some unnamed individual at some unstated location.

While we recognize that the attorney-client relationship is one of utmost confidence, we think that the rule of exclusion that protects confidential communications arising out of this relationship cannot be invoked to enable a client to use the office of the attorney to evade or avoid an obligation to the courts or other investigative body which the client himself would be required to recognize.

QUESTIONS LACKING PERTINENCY

Throughout the interrogation of several of the appellants, counsel for the Committee would ask the witness; for example, "Do you know Bertha Teplow," or "Do you know Anna Rosenblatt?" We point out that the questions quoted are merely illustrative of a type of interrogation. To illustrate the point we are about to make we mention a question appearing elsewhere in this opinion where a witness was asked, "Do you know Arlington Sands," and the counsel for the Committee supplemented his question by explaining that a previous witness had testified that Arlington Sands was a suspected member of the Communist Party, thereby demonstrating the pertinency of the inquiry. We have held this to be a pertinent and proper question. However, we think that in the absence of a showing of pertinency by relating the name of the person to a proper subject of the inquiry, the bald question, such as, "Do you know Bertha Teplow," would not in and of itself be pertinent to the inquiry within the rules which we have hereinabove announced. Had counsel gone further, as he did in the "Arlington Sands question," and explained the pertinency of the question by stating the relationship between Bertha Teplow and the subject of the inquiry, then it would have been proper to have required an answer. However, until such pertinency is made clear to the witness, he would be justified in declining to answer on the ground of lack of pertinency. In these instances, therefore, we are compelled to disagree with the trial judge and his order directing answers to particular questions of which these are illustrative will have to be reversed. In an investigation of this nature, unless the pertinency of the question is indisputably clear, when a witness objects on grounds of lack of pertinency it is the duty of the investigative body to point out the manner in which the propounded question is pertinent to the subject of the inquiry. Watkins v. United States, supra.

SUMMARY OF HOLDINGS

For the guidance of the lower court and the parties, we herewith summarize our holdings as follows:

(1) Chapter 57-125, Laws of Florida 1957, establishing appellee Committee is constitutional.

(2) The Florida Legislature, through appellee Committee has the power to investigate the matters stated in the statute

and announced by the Chairman as the subject of the inquiry.

(3) A state government acting through its Legislature has the power to control seditious conduct leveled against the state or the conduct of subversive activities within the state. It therefore has the power to investigate the conduct of such activities within the state as a preliminary to legislative action.

(4) The subject of this inquiry was made sufficiently clear by the provisions of the enabling statute and the opening statement of the Chairman.

(5) Certain questions were not shown to be pertinent to the inquiry on the face of this record. Other questions were demonstrated to be clearly pertinent and should be answered or propounded.

(6) There was no basis for the contention that the appellee Committee had disqualified itself by reason of an alleged exhibited prejudice.

(7) Witnesses who were directed to have available the records of NAACP should have them available or else disclose their whereabouts, if they can do either. Such witnesses may be required to refer to such records and answer under oath any inquiry regarding any individual whose association with NAACP is shown to be pertinent to the inquiry in accord with the rules announced in this opinion.

(8) The attorney-client relationship is no barrier to answering the inquiries propounded to the witness Graves.

CONCLUSION AND JUDGMENT

As we conclude with a degree of apology for the prolixity of our pronouncements we indulge ourselves the hope that it will be apparent to all parties to this record that their cause has been fully and fairly considered. Though the pathway to justice is sometimes as awesome as that which led Sir Galahad to the Holy Grail, nonetheless, the achievement of the desirable objective is equally rewarding and justifies the effort.

As to the appellants Gibson and Albury the judgment is affirmed. As to the other appellants the judgments are affirmed in part and reversed in part and the cause is remanded to the trial judge for further proceedings consistent herewith.

It is so ordered.

TERRELL, C.J., concurs with opinion

ROBERTS, DREW and O'CONNELL, JJ., concur in opinion by THORNAL, J.

* * *

[*Concurring Opinion*]

TERRELL, Chief Justice.

I agree with the pronouncements in the very thorough opinion prepared by Mr. Justice Thornal. I do not overlook the fact that one being tried by the appropriate court is entitled to the benefit of every constitutional guaranty in support of his defense but in this case appellants were being investigated for subversive activities, clearly violative of state and federal law. Not only that, they are in contravention of the philosophy and principles on which democratic government as we know it rests. When one is charged with being a member of, or who lends allegiance to, an institution or organization which has for its purpose the overthrow of this government by force or violent means, it is not becoming in him to hide or secrete his conduct or identity from an investigating committee. It would be more becoming for him to come forward with proof that he has no connection with such activities and demonstrate conclusively that the charges are groundless. It is the shortest and in fact the only means by which he can clear himself and erase the shadow cast upon him by the charges. A lawyer cannot, consistent with his oath, defend against such charges on any other ground.

PUBLIC ACCOMMODATIONS
Cemeteries—New Jersey

In the Matter of GEORGE WASHINGTON MEMORIAL PARK CEMETERY ASSOCIATION.

Superior Court of New Jersey, Chancery Division, October 31, 1958, 145 A.2d 665.

SUMMARY: A New Jersey cemetery company operated under a by-law limiting burials in its cemeteries to bodies of white persons and included restrictive covenants to the same effect in all burial plot deeds. A complaint against the enforcement of this restriction was made to the State Division Against Discrimination, and then referred to a county prosecutor for proceedings under a state statute making it a misdemeanor for cemetery companies to refuse on color grounds to permit the burial of any deceased person. Pending that proceeding, the company sought in a state court a determination of the legality of the deed covenants. The court held that the covenants were contrary to the public policy of the state indicated in the statute and therefore unenforceable and void.

GRIMSHAW, J.S.C.

The plaintiff herein seeks a judgment determining the legality of a covenant in the deeds executed by the Cemetery Company which restricts the burial privileges to persons of the white or Caucasian race. A stipulation of the facts bearing upon the situation has been executed. It is as follows:

"It is hereby stipulated and agreed by and between the attorney of the plaintiff corporation and the Attorney General of the State of New Jersey that the following facts are to be considered as true for the purpose of the judgment of this court:

"1. The George Washington Memorial Park Cemetery Association is incorporated as a non-profit corporation in the State of New Jersey for the purpose of operating a cemetery.

"2. It is presently operating and for a number of years has operated a memorial park type cemetery located in the Borough of Paramus, County of Bergen and State of New Jersey.

"3. It has conveyed by deed a large number of cemetery lots to the public, which deed contains a grant of a right of Sepulture.

"4. In the year 1939 the trustees of the plaintiff corporation adopted a By-law which provides that no bodies except those of persons of the white or caucasian race should be buried in the cemetery. All deeds issued by the plaintiff corporation provided that the grantee agreed to abide by all cemetery by-laws and ordinances, conditions, and the like, and included in all deeds was a provision reading as follows:

" 'No bodies, except those of persons of the white or caucasian race, shall be interred in said property or portion thereof.'

"5. Since the cemetery commenced operation, it has adhered to the restrictive by-law and deed provision referred to above.

"6. Only persons holding deeds to cemetery lots, plots or graves, or members of the families or transferees of such deeds approved by the cemetery, can be interred in the cemetery.

"7. A complaint arising out of the cemetery's enforcement of the restrictive provisions mentioned above was in fact made to the State Division Against Discrimination, and by it referred to the office of the Bergen County Prosecutor as a possible violation of R.S. 10:1-9 [N.J.S.A.].

"8. Notice of the pendency of this proceeding was sent, between January 31, 1958 and February 7, 1958, to approximately 10,000 lot owners of the cemetery, as shown by affidavit on file with this court."

I have had the benefit of able and comprehensive briefs from the Attorney General and the counsel for the plaintiff, in which three questions were raised and discussed:

1. Can the cemetery lawfully refuse burial to nonwhites if a lot owner insists on such burial?

2. Can the cemetery lawfully restrict the sale of lots to those of the Caucasian race?

3. Is the provision in the deed and by-laws restricting burial to persons of the white or Caucasian race violative of our public policy?

The answer to the questions raised is to be found in R.S. 10:1-9, N.J.S.A., which reads as follows:

> "No cemetery corporation, association or company, organized under any law of this state, owning or having control of any cemetery or place for the burial of the dead, shall refuse to permit the burial of any deceased person therein because of the color of such deceased person, and any cemetery corporation, association or company offending against this section shall be guilty of a misdemeanor."

In view of the provisions of the statute just quoted, it is clear that the restrictive covenant here under consideration is against the public policy of this State, and hence is unenforceable and void. The answer to the first two questions is, "No," and to the third question the answer is, "Yes."

My attention has been called to N.J.S.A. 8:3-1, which apparently authorizes religious societies incorporated under the laws of this State to establish cemeteries in which burials may be restricted to persons of a certain faith or color. This statute was passed more recently than R.S. 10:1-9, N.J.S.A. Whether N.J.S.A. 8:3-1 is a valid exercise of the legislative power need not concern us, since, by its terms, it has no application to the plaintiff herein.

PUBLIC ACCOMMODATIONS
Private Clubs—New York

Application of LAKE PLACID CLUB, INC., for an order pursuant to Article 78 of the Civil Practice Act, v. Charles ABRAMS, individually and as Chairman of the New York State Commission Against Discrimination, and Blanche I. Lubow.

New York Supreme Court, Appellate Division, 3rd Department, December 4, 1958, 180 N.Y.S.2d 254.

SUMMARY: The New York State Commission Against Discrimination was investigating a club's admission practice when a Jewish organization filed a complaint on behalf of a Jewish woman, charging the club with discrimination because of creed, contrary to state statutes. The investigating commissioner found the club not to be a place of public accommodation and dismissed the complaint. Commission rules provide that application for reconsideration must be filed within 15 days after notice of dismissal is mailed. Seven days after the dismissal the organization wrote a letter to the commission chairman requesting an extension of time, within which to decide whether to seek a reconsideration. The chairman, abroad at the time, did not return for several weeks, after which he classified the letter as an application for reconsideration. On application by the club, the state trial court granted a prohibition against the commission chairman, on the grounds that the letter was not an application for reconsideration, that the time for filing such an application had expired, and that the chairman had no authority to waive the commission's rule. On appeal, the Appellate Division reversed and ordered the prohibition proceeding dismissed. The court held that, since no substantial legal right of the club was violated, the chairman had power to waive strict compliance with commission rules setting a time limit for reconsideration applications. 179 N.Y.S. 2d 487, 3 Race Rel. L. Rep. 1224 (1958). The club's application for a stay pending appeal to the Court of Appeals was granted on condition that it perfect its appeal, file record and its brief before January 9, 1959, and be ready for argument by February 23, 1959.

Supreme Court, Appellate Division, Third Department. Dec. 4, 1958. Application for a stay pending appeal to the Court of Appeals from a decision of this Court. App. Div., 179 N.Y.S.2d

487. Application granted upon condition that appellant perfect its appeal, file record in the Court of Appeals, and its brief, on or before January 9, 1959 and is ready to argue the matter at the session of the Court of Appeals commencing February 23, 1959.

FOSTER, P. J., and BERGAN, GIBSON and HERLIHY, JJ., concur.

PUBLIC ACCOMMODATIONS
Race Tracks—New Jersey

Angelo GARIFINE, v. MONMOUTH PARK JOCKEY CLUB, a New Jersey corporation, and Thoroughbred Racing Protective Bureau, Inc., a New York corporation.

Supreme Court of New Jersey, January 19, 1959, 148 A.2d 1.

SUMMARY: After several expulsions, as "an undesirable," from a race track operated by a private New Jersey Jockey Club, the excluded person filed a complaint in the state Chancery Division against the club and its private police, requesting injunctive relief against further exclusion. Motion to dismiss the complaint was granted for lack of a basis for injunctive relief because defendants had an absolute right to exclude and expel plaintiff. On appeal the Supreme Court of New Jersey affirmed, finding no force in the contention that the common-law right of most businesses, including places of amusement, to exclude any persons they please from their private property should be limited as to the club because, as a licensee, it has "secured the advantage of a State monopoly." Defendants' good faith or sound purpose not having been questioned and no urgent consideration of justice or policy having been presented to justify change, the court refused to alter the common-law doctrine. The court also rejected plaintiff's contention that the exclusion was unlawful under the state Civil Rights Act, holding the Act inapplicable since the exclusion was not based on race, creed, color, national origin or ancestry.

JACOBS, J.

This is an appeal from the Chancery Division's refusal to grant the plaintiff's request for injunctive relief against his exclusion and expulsion from the Monmouth Park race track. We certified the appeal on our own motion while it was pending in the Appellate Division.

The defendant Monmouth Park Jockey Club is a New Jersey corporation which operates the Monmouth Park race track at Oceanport. It employs the defendant Thoroughbred Racing Protective Bureau, Inc., a New York corporation, to police the grounds on which its horse races are conducted. On July 2, July 8, and July 9, 1955 the plaintiff Angelo Garifine entered the track after paying the customary admission fee but left when he was requested to do so by a representative of the Protective Bureau. On July 11, 1955 the plaintiff was again requested to leave the track but he refused and was arrested and charged with being a disorderly person. He was acquitted in proceedings before the local magistrate. On December 13, 1956 he filed an action in the Superior Court seeking damages in three separate counts, for malicious prosecution, false arrest, and deprivation of his right to attend the track. On motion the counts, other than the count relating to malicious prosecution, were dismissed. On June 11 and June 12, 1957 the plaintiff attended the races at the Monmouth Park race track, and on June 12, 1957 a representative of the defendants swore out a warrant and complaint charging him with being a trespasser.

[*Complaint Filed*]

On June 19, 1957 the plaintiff filed his complaint in the Chancery Division seeking injunctive relief against his further exclusion and expulsion from the race track. His complaint

stated that he had never been convicted of a crime, although he was once charged with being a bookmaker and was acquitted. It also stated that he had inquired concerning the reason for his expulsions and had been told "that he is not wanted, that he is an undesirable, and that his general record and reputation warrants his exclusion." The defendants moved to dismiss the plaintiff's complaint on the ground that they had "an absolute right" to exclude and expel the plaintiff and that consequently he had no claim for injunctive relief. On April 22, 1958 the Chancery Division granted the defendants' motion and dismissed the complaint. In attacking this action the appellant urges (1) that notwithstanding the holding of the former Supreme Court in Shubert v. Nixon Amusement Co., 83 N.J.L. 101, 83 A. 369 (Sup.Ct.1912), the operator of a licensed race track should not have the common law right to exclude or expel a patron without reasonable cause, and (2) that under the provisions of the Civil Rights Act of New Jersey (R.S. 10:1-2 et seq., N.J.S.A.) the operator of a licensed race track has no such right.

[*Early Common Law*]

There was a time in English history when the common law recognized in many callings the duty to serve the public without discrimination. See Arterburn, "The Origin and First Test of Public Callings," 75 U.Pa.L.Rev. 411 (1927). Cf. Burdick, "The Origin of the Peculiar Duties of Public Service Companies," 11 Colum.L.Rev. 514 (1911); Wyman, "The Law of the Public Callings as a Solution of the Trust Problem," 17 Harv.L.Rev. 156 (1904). With the passing of time and the changing of conditions, the common law confined this duty to exceptional callings where the needs of the public urgently called for its continuance. Innkeepers and common carriers may be said to be the most notable illustrations of business operators who, both under early principles and under the common law today, are obliged to serve the public without discrimination; in Delaware, L. & W. R. Co. v. Trautwein, 52 N.J.L. 169, 171, 19 A. 178, 179, 7 L.R.A. 435 (E. & A. 1889), Justice Depue aptly described this obligation as "a duty imposed by law from considerations of public policy." See Weehawken Tp. v. Erie Railroad Co., 20 N.J. 572, 581, 120 A.2d 593 (1956); Messenger v. Pennsylvania R. Co., 37 N.J.L. 531, 533 (E. & A.1874). Cf. Pinkerton v. Woodward, 33 Cal. 557, 91 Am.Dec. 657, 660 (Sup.Ct.1867). On the other hand, operators of most businesses, including places of amusement such as race tracks, have never been placed under any such common-law obligation, for no comparable considerations of public policy have ever so dictated. See Madden v. Queens County Jockey Club, 296 N.Y. 249, 72 N.E.2d 697, 1 A.L.R.2d 1160 (Ct. App.1947), certiorari denied 332 U.S. 761, 68 S.Ct. 63, 92 L.Ed. 346 (1947); Greenfield v. Maryland Jockey Club, 190 Md. 96, 57 A.2d 335 (Ct.App.1948). Cf. Marrone v. Washington Jockey Club, 227 U.S. 633, 33 S.Ct. 401, 57 L.Ed. 679 (1913); Martin v. Monmouth Park Jockey Club, 145 F.Supp. 439 (D.C.D.N.J. 1956), affirmed 242 F.2d 344 (3 Cir., 1957); Watkins v. Oaklawn Jockey Club, 86 F.Supp. 1006 (D.C. Ark.1949) affirmed 183 F.2d 440 (8 Cir., 1950); Turner and Kennedy, "Exclusion, Ejection, and Segregation of Theater Patrons," 32 Iowa L.Rev. 625, 626 (1947); Annotations "Refusing admission to, or ejecting from, place of amusement," 30 A.L.R. 951 (1924); 60 A.L.R. 1089 (1929); 86 C.J.S. Theaters and Shows § 31, p. 709 (1954); 52 Am.Jur., Theaters, Shows, Exhibitions, etc., §§ 3, 6, pp. 255, 257 (1944).

[*Wood v. Leadbitter Considered*]

In the well-known case of Wood v. Leadbitter, 13 M. & W. 838, 153 Eng.Rep. 351 (Ex. 1845), the court had occasion to deal, not with an exclusion, but with an ejection from the Doncaster race course. The plaintiff had purchased his ticket, had entered the grounds, and had refused to leave when asked to do so because of some alleged malpractices on former occasion. He was forcibly ejected, and sued in trespass for assault and false imprisonment. In denying recovery, the court took the position that the plaintiff had no easement or similar property right entitling him to remain on the grounds after the request that he leave, but had only a personal license which could be revoked at any time, leaving the plaintiff with only a breach of contract claim. In Hurst v. Picture Theatres, Ld., [1915] 1 K.B. 1 (1914), the court rejected the holding in Leadbitter and allowed recovery in an assault action by the purchaser of a theatre ticket who was forcibly ejected by the proprietor who acted on the mistaken belief that the plaintiff had not paid his admission fee. Lord Justice Buckley expressed the view that it would

be neither good sense nor good law to hold that a theatre proprietor had the absolute right to eject a patron who had paid for his ticket and was peaceably occupying his assigned seat; he considered the theatre ticket to be a license bearing an agreement not to revoke which equity would enforce. See Winter Garden Theatre (London), Ld. v. Millennium Productions, Ld., [1948] A.C. 173, 189. The Hurst case has been the subject of extensive discussion; some commentators have approved its result as just and equitable, whereas others have disapproved it as violative of principles of real property law. See Winfield, Torts, 389 (6th ed. 1954); Salmond, Torts 277 (11th ed. 1953); Wade, "What is a License", 64 L.Q.Rev. 57 (1948); 7 Holdsworth, A History of English Law 328 (1925); Miles, "Hurst v. Picture Theatres, Ltd.," 31 L.Q.Rev. 217 (1915). In Cowell v. Rosehill Racecourse Co. Ltd., 56 Commw.L.R. 605 (1937), the High Court of Australia, with Justice Evatt dissenting, followed Leadbitter and declined to allow recovery in an assault action by a patron who had been ejected after he had refused a request to leave the race track. Similarly, the courts throughout the United States have generally adhered to Leadbitter. See Shubert v. Nixon Amusement Co., supra; Woollcott v. Shubert, 217 N.Y. 212, 111 N.E. 829, L.R.A. 1916E, 248 (Ct.App.1916); Finnesey v. Seattle Baseball Club, 122 Wash. 276, 210 P. 679, 30 A.L.R. 948 (Sup.Ct.1922); Meisner v. Detroit, B. I. & W. Ferry Co., 154 Mich. 545, 118 N.W. 14, 19 L.R.A.,N.S., 872 (Sup.Ct.1908); Horney v. Nixon, 213 Pa. 20, 61 A. 1088, 1 L.R.A.,N.S., 1184 (Sup.Ct. 1905); Burton v. Scherpf, 83 Mass. 133 (Sup.Jud.Ct.1861); Annotation, "Exclusion of person (for reason other than color or race) from place of public entertainment or amusement," 1 A.L.R.2d 1165 (1948).

[*A New Jersey Precedent*]

In Shubert v. Nixon Amusement Co., supra [83 N.J.L. 101, 83 A. 371], the plaintiff Lee Shubert purchased a ticket for a Newark show of his competitor Florenz Ziegfeld. He took a seat and while occupying it peaceably he was asked to leave. He did so and then filed a tort action against Ziegfeld and the Nixon Amusement Company. His action was dismissed by the former Supreme Court which noted that "whatever views may be entertained as to the natural justice or injustice of ejecting a theatre patron without reason after he has paid for his ticket and taken his seat," it felt constrained to follow the holding in Leadbitter "as the settled law." In Woollcott v. Shubert, supra, the New York Court of Appeals took somewhat the same approach. There Alexander Woollcott, a drama critic employed by the New York Times, had written an adverse review of a production controlled by Lee Shubert and his associates. They excluded him from one of their theatres and threatened to exclude him from all of them. Mr. Woollcott sought injunctive relief but his action was dismissed[1] in an opinion which read in part as follows:

> "The acts of the defendants were within their rights at the common law. At the common law a theatre, while affected by a public interest which justified licensing under the police power or for the purpose of revenue, is in no sense public property or a public enterprise. It is not governed by the rules which relate to common carriers or other public utilities. The proprietor does not derive from the state the franchise to initiate and conduct it. His right to and control of it is the same as that of any

1. In his article on "The Privilege Of Forcibly Ejecting An Amusement Patron," 90 U.Pa.L.Rev. 809, 821 (1942), Mr. Conard quotes the following self-explanatory letter from Mr. Woollcott:

"As the first gestures failed to induce the Times to send another reviewer to their shows, they [the Shuberts] tried out the system of barring me from the theater. * * * Within ten minutes the Times had excluded all Shubert advertising from its columns and also all allusion to any actor playing in a Shubert theater. Next it instituted in my name an application for permanent injunction. * * * There were thus two entirely separate weapons brought to bear.

"In the case of the legal weapon, we lost. * * * There was some fainthearted talk of agitation for * * * a statute but at the time I saw no point in it. If a newspaper is pusillanimous the statute would not do its readers any good. If a newspaper is independent in spirit it needs no such statute. This was demonstrated in my own case because, having won the decision in the courts, the Shuberts were no better off than before. Their plays, their players and their advertising were ignored. Under this treatment they soon came begging for my return and even ate crow in the form of an open letter asking me to return."

See the later New York legislation relating to the admission of theatre ticket holders which was held to be constitutional in Christie v. 46th St. Theatre Corporation, 265 App.Div. 255, 39 N.Y.S.2d 454 (App.Div.1942), affirmed 292 N.Y. 520, 54 N.E.2d 206 (Ct.App.1944); 292 N.Y. 643, 55 N.E.2d 512 (Ct.App.1944), certiorari denied 323 U.S. 710, 65 S.Ct. 35, 89 L.Ed. 571 (1944).

private citizen in his property and affairs. He has the right to decide who shall be admitted or excluded. His rights at common law, in the respect of controlling the property, entertainments, and audience, have been too recently determined by us to be now questionable. People ex rel. Burnham v. Flynn, 189 N.Y. 180, 82 N.E. 169, 12 Ann.Cas. 420; Collister v. Hayman, 183 N.Y. 250, 76 N.E. 20, 1 L.R.A.,N.S. 1188, 111 Am.St.Rep. 740, 5 Ann.Cas. 344; Aaron v. Ward, 203 N.Y. 351, 96 N.E. 736, 38 L.R.A., N.S., 204. Under the common law the rights of the plaintiff were not violated by the acts of the defendants." (111 N.E. at page 830.)

[*Supreme Court Decision*]

In Marrone v. Washington Jockey Club, supra [227 U.S. 633, 33 S.Ct. 402], the plaintiff Joseph Marrone had been excluded from the Bennings Race Track on the charge that he had doped or drugged a horse. He brought an action for trespass for forcibly preventing him from entering the track and turning him out after he had bought an admission ticket and had dropped his ticket into the box. The District Court for the District of Columbia entered judgment against the plaintiff and this was affirmed on appeal by the Court of Appeals and the United States Supreme Court. In its opinion by Justice Holmes, the Supreme Court stated that it saw no reason for declining to follow the commonly accepted rule of Leadbitter; that the plaintiff's ticket gave him no "right *in rem*" and "no right to enforce specific performance by selfhelp"; and that "his only right was to sue upon the contract for the breach." The Supreme Court did not discuss any of the pertinent policy considerations; if it had it would, under the facts presented to it (which may rightly be contrasted with the much more persuasive circumstances presented by the plaintiffs in the Shubert cases), presumably have reached the same result. The defendant was in the position to assert more than the traditional common-law right of the private entrepreneur to choose his patrons; its business admittedly tended to attract many undesirables who could freely roam about its premises, and it was well-advised to be on the lookout for them and to bar them whenever possible. It would seem rather unwise to deter its cautionary efforts by judicial rulings placing heavy evidential burdens upon it or imposing tortious responsibility of perchance it acted mistakenly; in this connection the substantial interests of the defendant would appear to coincide with those of the public generally and to outweigh the comparatively slight interests of its patrons. See Note, 10 Md.L.Rev. 169, 184 (1949).

[*Other Cases*]

In Madden v. Queens County Jockey Club, supra [296 N.Y. 249, 72 N.E.2d 699], the defendant excluded the plaintiff from its Aqueduct Race Track in the mistaken belief that he was Frank Costello's bookmaker. He thereupon sought a judicial declaration that he was entitled to enter the race track upon paying the required admission price; the New York Court of Appeals, citing Marrone v. Washington Jockey Club, supra, held that he was not entitled to any such declaration either at common law or under New York's Civil Rights Law, McKinney's Consol.Laws, c. 6. In the course of his opinion, Judge Fuld readily disposed of the plaintiff's contentions that the defendant's license to conduct pari-mutuel betting constituted it "an administrative agency of the state" and that its license "is a franchise to perform a public purpose." He soundly pointed out (1) that the defendant licensee was no more a state administrative agent than was the licensed cab driver, barber or liquor dealer, and (2) that the defendant's operation was not under a franchise for the performance of a public function but was under a license imposed for revenue and the regulation of a private business which, like the alcoholic beverage industry, entailed inherent dangers and was clearly affected with a public interest. See Salmore v. Empire City Racing Ass'n, 123 N.Y.S.2d 688, 692 (Sup.Ct. 1953), where the court noted that New York's "law permitting pari-mutuel betting was simply a revenue law enacted almost entirely for the purpose of raising money, with the improvement of the breed of horses a mere palliative cloak."

In Greenfeld v. Maryland Jockey Club, supra, the Maryland Court of Appeals, relying on the Madden case, affirmed the dismissal of the plaintiff's bill which sought (1) a declaratory decree that the plaintiff was entitled, upon payment of admission charges, to attend any race meetings conducted by the defendant, and (2) an injunction against interference with him "while in attendance as a spectator and bettor" at any race meeting. In his opinion for the court Judge Markell pointed out that racing was "a

minutely regulated, heavily taxed business in which private rights and responsibility have not been wholly extinguished"; that the racing law had conferred "no personal right on individuals to attend or bet at race meetings"; and that, assuming the racing commission had power to do so, it had never adopted any regulation compelling the licensee "to admit all comers" as spectators and bettors unless excluded for good cause. In Watkins v. Oaklawn Jockey Club, supra, the court held that the exclusion of the plaintiff from the defendant's race track as an alleged undesirable did not constitute action of a state or a state administrative agency and did not deprive him of any rights or privileges guaranteed by the United States Constitution and the laws thereunder. In Martin v. Monmouth Park Jockey Club, supra [145 F.Supp. 440], the plaintiff was a jockey who had been suspended in Maryland because he had placed a bet on a horse running against the one he was riding. He was notified by the defendant that he would not be permitted to ride at the Monmouth Park race track and he sought injunctive relief from the United States District Court for the District of New Jersey. His complaint was dismissed in an opinion which stressed that the defendant, although intensely regulated, is still a private corporation which has the right, except as restricted by New Jersey's statutes relating to racial discrimination, "to admit or exclude any person as it pleases from its private property".

[*No Contrary Cases*]

No holdings contrary to the foregoing have been cited by the plaintiff; and although he has urged that the defendant's common-law right of exclusion from its race track should be limited because as a licensee "it has secured the advantage of a State monopoly," we find no force in his contention. See Madden v. Queens County Jockey Club, supra; Greenfeld v. Maryland Jockey Club, supra. The rules of the New Jersey Racing Commission say nothing about any individual patron's right to admission, but they do provide that the Association conducting the race meeting shall police its grounds and shall eject "persons believed to be bookmakers" along with other undesirables. (Rule No. 22 (1958).) The rules contain general provisions for appeal to the Commission but since they are not involved in this proceeding we need not pass upon their scope. The burden of the plaintiff's present attack is on the common-law doctrine which he states should be altered to afford to him a right of admission to the race track in the absence of affirmative legal proof by the defendant that there is good cause for his exclusion. We are satisfied that, without regard to views which may be entertained in other types of cases, there has been no showing made here for such alteration. The plaintiff's complaint states that the defendant advised him that he is not wanted at the race track and that his general record and reputation warrant his exclusion. It does not question the defendant's good faith or sound purpose nor does it present any countervailing circumstances or any urgent considerations of justice or policy which might move a court to depart from the many judicial decisions which have sustained the common-law right of race track operators to exclude suspected undesirables.

[*N. J. Civil Rights Act*]

We come now to the plaintiff's alternative claim that under the provisions of the Civil Rights Act of New Jersey (R.S. 10:1-2 et seq., N.J.S.A.) the defendant has no right to exclude him from its race track. That statute was originally enacted in 1884 (L.1884, c. 219, p. 339) and was modeled upon the earlier federal legislation dealt with in the Civil Rights Cases (United States v. Stanley), 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883). It provided, in section 1, that all persons in New Jersey shall be entitled to the full enjoyment of places of public accommodation and amusement, "subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude," and in section 2 that persons who violated section 1 shall forfeit the sum of $500 to the aggrieved party and shall also be guilty of a misdemeanor. The statute was obviously aimed at discriminations based on color and race and left unimpaired the right of exclusion for unrelated reasons. See Shubert v. Nixon Amusement Co., supra, 83 N.J.L. at page 102, 83 A. 369; Martin v. Monmouth Park Jockey Club, supra; Woollcott v. Shubert, supra; Finnesey v. Seattle Baseball Club, supra; Grannan v. Westchester Racing Ass'n, 153 N.Y. 449, 47 N.E. 896 (Ct. App.1897); Turner and Kennedy, supra, 32 Iowa L.Rev. at pp. 631, 637.

[*Definitions Added*]

In 1917 the Civil Rights Act was amended to include a comprehensive definition of a "place of public accommodation, resort or amusement." L.1917, c. 106, p. 220. In 1921 it was again amended to include additional places of public accommodation, resort or amusement and to prohibit the publication of advertisements indicating that accommodations would be denied to any person because of race, creed or color; although there were verbiage changes, the amendment contained nothing whatever to suggest any legislative purpose to enter the common-law field of exclusions for unrelated reasons. See L. 1921, c. 174, p. 468; Woollcott v. Shubert, supra; Martin v. Monmouth Park Jockey Club, supra. When the Civil Rights Act, as amended, was incorporated into the Revision of 1937, there were no changes of substance, and its paragraph separations in R.S. 10:1-2 et seq. N.J.S.A. were not intended to and did not alter the meaning and effect of the pre-existing legislation. See Murphy v. Zink, 136 N.J.L. 235, 244, 54 A.2d 250 (Sup.Ct.1947), affirmed 136 N.J.L. 635, 57 A. 2d 388 (E.&A. 1948); Hartman v. City of Brigantine, 42 N.J.Super. 247, 255, 126 A.2d 224 (App. Div.1956), affirmed 23 N.J. 530, 129 A.2d 876 (1957).

In 1945 the Legislature broadened the language of the Civil Rights Act to refer expressly to discriminations based on national origin and ancestry as well as those based on race, color and creed (L.1945, c. 168, p. 587, N.J.S.A. 10:1-3, 6, 8); and in the same year it enacted the Law Against Discrimination which created the Division against Discrimination in the State Department of Education and empowered it to eliminate employment discriminations based on such reasons. L.1945, c. 169, p. 589; R.S. 18:25-1 et seq., N.J.S.A. See also L.1945, cc. 170-174, N.J. S.A. 10:1-10, 10:1-11, 10:2-1, 18:14-2, 30:9-17. In 1949 a bill was introduced which, according to its introducer's statement, was "intended to combine in one law the substantive provisions of the existing Civil Rights Law, Revised Statutes, 10:1-2 to 10:1-7, and the existing Law against discrimination, Revised Statutes, sections 18:25-1 to 18:25-28". See Assembly No. 65 (1949). This bill, as amended, became L.1949, c. 11, p. 37, renamed the Division against Discrimination as the Commission on Civil Rights, and extended the scope of L.1945, c. 169, to include discriminations in places of public accommodation and amusement based on race, creed, color, national origin or ancestry; it is clear from the terms of the statute that it did not in any wise bear upon the right of exclusion for other reasons.

[*Inapplicable to Non-Racial Exclusion*]

All of the decisions which have dealt with the provisions of New Jersey's Civil Rights Act (R.S. 10:1-2 et seq. N.J.S.A.; cf. R.S. 18:25-1 et seq. N.J.S.A.), or with comparable provisions elsewhere, have held that they are inapplicable to exclusions which are wholly unrelated to race, creed, color, national origin or ancestry. See Shubert v. Nixon Amusement Co., supra; Woollcott v. Shubert, supra; Martin v. Monmouth Park Jockey Club, supra; Finnesey v. Seattle Baseball Club, supra. The California case cited by the plaintiff dealt with a local statute which provides that it shall be unlawful for the operator of a race course or other place of public amusement "to refuse admittance to any person over the age of twenty-one years," although any person "who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded" (Cal.Civil Code, sec. 53). See Orloff v. Los Angeles Turf Club, 30 Cal.2d 110, 180 P.2d 321, 171 A.L.R. 913 (Sup.Ct.1947). Cf. Orloff v. Los Angeles Turf Club, 36 Cal.2d 734, 227 P.2d 449 (Sup.Ct.1951); Orloff v. Hollywood Turf Club, 110 Cal.App.2d 340, 242 P.2d 660 (D.Ct. App.1952). The New Jersey Legislature has not seen fit to adopt any similar statutory provision, and consequently the decisions construing the California statute can have no effect here. Since the plaintiff does not suggest that his exclusion was based on race, creed, color, national origin or ancestry we find the Civil Rights Act to be inapplicable.

The judgment entered in the Chancery Division is in all respects:

Affirmed.

For affirmance: Chief Justice WEINTRAUB and Justices HEHER, WACHENFELD, BURLING, JACOBS, FRANCIS and PROCTOR—7.

For reversal: None.

TRANSPORTATION
Buses—Georgia

Reverend Samuel WILLIAMS, Reverend John T. Porter v. GEORGIA PUBLIC SERVICE COMMISSION, et al.

United States District Court, Northern District, Georgia, Atlanta Division, January 21, 1959, Civil Action No. 6067.

SUMMARY: Two Negro ministers in Atlanta, Georgia, brought an action in federal district court against state and local transit authorities and law enforcement officials to have certain municipal ordinances and state statutes requiring racial segregation of passengers on trolley buses declared unconstitutional and to secure injunctive relief against future arrests under color of such laws. Plaintiffs, while riding a bus in Atlanta, had been subjected to an attempt by the bus operator to enforce segregated seating under those laws; and certain other Negro ministers, not parties to this case, had been arrested and indicted for violating the laws. Although some two years had elapsed since the arrests, the state had not brought those cases to trial, but were said to be awaiting the outcome of the instant proceedings. Meanwhile, Atlanta Negroes at the behest of their leaders had made no attempt to occupy bus front seats when rear seats were available. Under these circumstances, while declaring the challenged ordinances and statutes void, the court found it unnecessary to issue an injunction, because there was no "clear and imminent danger" of any attempt to enforce the laws so invalidated. However, jurisdiction was retained for the purpose of deciding future injunction applications by plaintiffs should there be attempts to arrest them for violation of the voided laws. [Footnotes have been renumbered.]

HOOPER, District Judge.

The plaintiffs, two negro ministers of the City of Atlanta, brought this action for declaratory judgment and injunctive relief against the Chief of Police and other officials of the City of Atlanta, against the Georgia Public Service Commission and its members, and against Atlanta Transit System, Inc., operating electric trolley busses in the City of Atlanta. Motions to dismiss were filed by defendants, comprehensive briefs were filed by all counsel, the motions were overruled and the case set for final trial on January 5, 1959, but this hearing by consent of parties was converted into a pre-trial only. At the end of this hearing the Court announced the final trial would be set down in a few days, whereupon defense counsel, on account of the absorption by the Attorney General's office with a session of the Georgia Legislature to commence the following Monday, January 12, 1959, moved for a continuance during the forty-day session then commencing, which motion the Court took under advisement.

[*Trial Court Hearing*]

After some reflection the Court concluded that under the record as it then stood, substantially nothing further could be accomplished by hearing further evidence in the case and accordingly set the case for a hearing on Friday, January 9, 1959 for the purpose of announcing tentative Findings of Fact and contemplated Decree to be entered by the Court, after giving the parties an opportunity to offer further evidence. On such announcement by the Court the plaintiff introduced in evidence certain documentary evidence, the defendants offered no further evidence.

At this hearing the Court, after giving a summary of the facts in the record announced that a declaratory judgment would be granted, declaring invalid the segregation ordinances and statutes hereinafter described, but that no injunction against future arrests thereunder would be made unless there were a change in circumstances, and to that end the Court would retain jurisdiction of the case. The peculiar circumstances surrounding the case which prompted the Court to find that no injunction is now necessary, are set out in the Findings of Fact below. The Court commended all parties to the litigation for the restraint which they had shown in connection with this matter for the period of approximately two years since the first incidents occurred which were made the basis of the suit.

THE FACTS IN THE CASE

It is not disputed that the plaintiffs, while riding on a trolley bus of the defendant Transit Company, were confronted with an attempt by the operator of the bus to enforce the ordinances and statutes hereinafter described, which placed a positive duty on the operator to assign the passengers so as to cause a separation of the races. The Transit System, while admitting its custom and practice to segregate as aforesaid, offered the reasonable explanation that it was compelled to do so, or to risk a forfeiture of its franchise to operate.

It also appears that on January 9, 1957 other negro ministers of Atlanta, while riding on a trolley, were arrested for alleged violation of a Georgia statute involved herein, a warrant was taken out, the matter was presented to the Grand Jury of Fulton Superior Court, which returned an indictment. Although some two years have intervened since that time, no step has been taken by the State of Georgia or any of its prosecuting attorneys, to have a trial of the cases. The defendants in such cases, although having the right under Georgia law to demand a trial during any term of court, and unless tried at that time, or the next succeeding term, to go free, have made no demand for trial, nor does it appear they had any reason to do so in view of the apparent reluctance of any one to prosecute.

At the hearing of this case on January 5, 1959 the Court called attention to the foregoing circumstances, whereupon one of the defense attorneys expressed the opinion that the State authorities were no doubt awaiting the outcome of this case before proceeding further. This Court therefore finds as a fact, that there is no clear and imminent danger that there will be a trial in the State courts of the ministers there under indictment, they not being parties to this case. Neither is there any clear and imminent danger that there will be any future arrests under the statutes or ordinances herein involved. Since the arrests of the other negro ministers on January 9, 1957 no further arrests have been made, or threatened. The negro citizens of this community, acting under the pleas for restraint and moderation by the negro ministers, have been making no attempt to occupy the seats at the front of the trolley busses if seats were available toward the rear.

It is true that it appears from the current press releases that the negroes in the community now intend, in a carefully guarded manner, to occupy the busses in a non-segregated manner, their leaders having given them careful instructions to do nothing that might provoke an incident. It appears equally clear to this Court that the authorities of the City of Atlanta, including the Chief of Police and the members of the police force, should there be any threatened breach of the peace, will adequately take care of the situation, nor does this Court anticipate, should any incident occur, that it will be related in any manner to any effort upon the part of any defendants, or of the plaintiffs, to violate the principles of law herein announced by the Court. Whether or not it would be proper under the law to restrain any future arrests is discussed below, but under the facts surrounding this case such an injunction appears clearly to be unnecessary.

CONCLUSIONS OF LAW

(1) This Court has jurisdiction of the subject matter and of the parties for the purpose of entering a declaratory judgment as to the invalidity of the ordinances and statutes hereinafter quoted, and such a declaratory judgment will be rendered.

The Court also has jurisdiction for entertaining plaintiffs' prayers for injunctive relief against any future arrests under such ordinances or statutes, but injunctive relief will be denied at this time for reasons hereinafter set forth, the Court reserving jurisdiction, however, for purpose of granting injunctive relief should there be a change in circumstances.

(2) The ordinances of the City of Atlanta under attack in this case are as follows:

"*Chapter 55, § 55.91. Segregation of Races.* Passengers on trackless trolleys operated in the limits of the city, and in territory outside the city limits which has been incorporated as a part of the city for police purposes, must observe and obey the requirements of the penal laws of the state as to the separate seating of the races in such cars; and any passenger failing to obey the directions of the conductor or person in charge of the car in this respect in so far as it is practicable to do so, shall be guilty of an offense and

punishable as provided in § 1.11 of this Code (Code 1942, § 85-138)."[1]

"Section 55.92. *Duty of Police in connection with preceding section.* It shall be the duty of the police to give special attention to ascertain whether conductors or other employees in charge of trackless trolleys to require passengers in their trains or cars to comply with the provisions of the laws of the state respecting separate seating of races in such cars; and in case of the violation of such laws by conductors or other employees of street railroad companies to arrest such persons so violating such laws, and prosecute them in the proper state court for such offenses (Code 1942 § 85-139)."

In substance the foregoing ordinances penalize passengers for violating the penal laws of the State of Georgia as to separate seating of the races, and also penalize the operators of the trolley busses for their failure to require their passengers to comply with the provisions of the state laws "respecting separate seating of races in such cars."

The Georgia statutes here under attack are the following:

Section 18-207, providing in part that: "All conductors of street cars and busses shall assign all passengers to seats on the cars under their charge, so as to separate the white and colored races as much as practicable; and all conductors and other employees of railroads, and all conductors of street cars and busses shall have and are hereby invested with, police powers to carry out said provisions."

Section 18-208, providing in part that: "The conductor and any and all employees on such cars are clothed with power to eject from the train or car any passenger who refuses to remain in the car, compartment, or seat assigned to him."

Section 18-9904, providing as follows: "Any passenger violating the provision of § 18-208, prohibiting any passenger from remaining in any car, compartment, or seat other than that to which he has been assigned shall be guilty of a misdemeanor. (Acts 1890-1, p. 157)."

The foregoing Georgia statutes provide in substance that the operators of busses shall assign passengers to seats as to separate the races, they are given police power to eject any passenger who refuses to remain in the seat assigned to him, and any passengers refusing to remain in the seat assigned shall be guilty of a misdemeanor and punishable upon a trial in a state court.

[*Constitutionality Attacked*]

While plaintiffs also attack Georgia Code § 68-616 and Georgia Code § 68-9911 these sections pertain only to motor common carriers and are not applicable to the facts in this case. Plaintiffs also cite Georgia Code § 93-307 which pertains to jurisdiction of the Georgia Public Service Commission giving it "general supervision of all common carriers," and giving it "authority to examine into the affairs of said companies and corporations, and to keep informed as to their general condition, . . . and the manner in which their lines . . . are managed, conducted and operated . . . with reference to their compliance with all provisions of law."

It is mandatory upon this Court to declare the aforesaid ordinances and statutes to be unconstitutional and void by reason of a decision by a three-judge court in the case of Browder, et al. v. W. A. Gayle, et al. 142 F.Supp. 707, affirmed by unanimous vote of the United States Supreme Court, 352 U.S., 903. The above stated case was followed and cited with approval by another three-judge court sitting in the Western District of Tennessee. See Evers, et al. v. Dwyer, et al., affirmed by the United States Supreme Court 359 U.S.—See 27 L.W., p. 4053. In the last cited case this language was used:

"That the appellant may have boarded this bus for the purpose of instituting this litigation is not significant."[2]

1. In passing it may be observed that this ordinance is not attacked upon the basis that it gives the courts of the city the power to inflict punishment for the violation of the state law. The Georgia appellate courts have ruled that a city ordinance identical with a state offense is null and void. The ordinance just quoted should be compared with the Georgia statute § 18-9904, hereinafter quoted, making it a misdemeanor for a passenger to remain in any seat other than that to which he has been assigned by the operator.

2. The opinion in that case further recites: "The record further shows that the appellees intend to enforce this state statute until its unconstitutionality has been finally adjudicated." An injunction in that case was granted. The instant case before this Court in so far as injunction is concerned, materially differs from the case just cited in regard to any proof of intention upon the part of defendants herein to seek to enforce the city ordinances or state statutes under attack.

In Browder v. Gayle, *supra,* the Court pointed out that while it had been ruled by the United States Supreme Court in Plessy v. Ferguson, 163 U.S., 537, that equal but separate accommodations by common carriers for white and colored races was valid, that that holding had been reversed in the case of Morgan v. Virginia, 328 U.S., 373, and in Henderson v. United States, 339 U.S. 816, and the three-judge court held:

"That the statutes and ordinances requiring segregation of the white and colored races on the motor busses of a common carrier of passengers in the City of Montgomery and its police jurisdiction, violated the due process and equal protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States."

This Court is in effect being requested to declare that the law as pronounced by the United States Supreme Court is the law, and this Court does so.

(3) In declining under present circumstances to issue an injunction against the enforcement of the aforesaid ordinances and statutes, herein held to be invalid, this Court is seeking to observe a vital and fundamental policy which for many years has been pronounced and followed by the United States Supreme Court and by other federal courts, to the effect that "federal courts of equity shall conform to clearly defined Congressional policy . . . by refusing to interfere with, or embarrass threatened prosecution in state courts, save in those exceptional cases which call for interposition of a court of equity to prevent irreparable injury which is clear and imminent."

The above principle was recently announced by the Sixth Circuit Court of Appeals in the case of Fuqua v. United Steel Workers of America, 253 F.2d, 594, citing in support thereof a number of decisions of the United States Supreme Court, including Douglas v. Jeanette, 319 U.S. 157; Amalgamated Clothing Workers v. Richmond Brothers, 348 U.S. 511; Stefanelli v. Minard, 342 U.S. 117, and other cases. The Court pointed out that:

"In determining the existence of equitable jurisdiction in cases like the present one it is therefore a strict test which the district court must apply" and added "within the meaning of that test the circumstances here did not in our opinion, justify a finding of danger of irreparable injury which was clear and immediate as to warrant intervention of a federal court of equity"

and the injunction requested was denied.

[*Facts Emphasized*]

As pointed out in Findings of Fact above set forth, this Court finds that there has been at no time since the arrest of the six other ministers by the City of Atlanta two years ago, any effort upon the part of the police authorities of the City of Atlanta, or of the State of Georgia, to make any arrests for alleged violations of any of the ordinances or statutes here under attack, and even the cases which were made two years ago against the negro ministers (not parties hereto) have never been tried, the only explanation given for the failure to prosecute being that the authorities are waiting the outcome of the instant case. It is also heretofore pointed out that the negroes of this community during the aforesaid two year period have been riding in the rear portion of the trolleys without any effort to mix with the white people, and it clearly appears there is a firm determination upon the part of the negro citizens as well as the authorities of the City of Atlanta, that any failure to segregate in the future shall be brought about in a careful manner and with the purpose if possible to avoid friction or unfortunate incidents. As a matter of fact, some of the defendants after the Court announced that this ruling would be made, expressed gratitude that no injunction was issued, and plaintiffs' counsel has stated that while he thought injunction would have been authorized, no particular disappointment was voiced upon the Court's failure to issue injunction, especially since jurisdiction for that purpose is retained.

Should the ordinances and statutes be repealed, or be amended so as to remove all unconstitutional features, this case will be at an end. Should any incidents arise because of a breach of the peace out of any attempts to enforce the ordinances aforesaid, plaintiffs may apply to this Court for injunction, but should any incidents arise otherwise, the Court is confident that they will be handled by the authorities of the City of Atlanta in a proper manner.

Plaintiffs' counsel may prepare a Judgment and Decree pursuant hereto, serving copy on defense counsel who will file any objections as desired, whereupon the Court will enter Final Judgment and Decree in the case.

This the 21st day of January, 1959.

TRIAL PROCEDURE
Juries—Arkansas

Luther BAILEY v. Lee HENSLEE, Superintendent of the Arkansas State Penitentiary.

United States District Court, Eastern District, Arkansas, Western Division, December 3, 1958, 168 F.Supp. 314.

SUMMARY: A Negro convicted of rape in an Arkansas state court appealed to the state supreme court on the ground that the trial court erred in overruling a motion to quash the regular and special panel of the petit jury because of an alleged systematic exclusion of Negroes from jury panels. The court found no evidence of such exclusion, stating that the right to trial by a jury of his peers does not include a right to have either a proportional number or any particular number of members of his race on the jury which tries him. The conviction was affirmed. *Bailey v. State*, 302 S.W.2d 796, 2 Race Rel. L. Rep. 997 (Ark. 1957), *cert. denied, Bailey v. Arkansas*, 355 U.S. 851, 2 Race Rel. L. Rep. 1097 (1957). The accused then filed a petition in the trial court under the Uniform Post-Conviction Procedure Act, alleging that he was denied the right to subpoena the jury commissioners. The trial court denied the petition, and the state Supreme Court affirmed, holding that the question of permitting the jury commissioners to testify had either been finally decided or had been waived in the first trial. *Bailey v. State*, 313 S.W.2d, 388, 3 Race Rel. L. Rep. 758 (Ark. 1958), *cert. denied*, "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court," 79 S.Ct. 101, 3 Race Rel. L. Rep. 868, *supra* (1958). The accused then petitioned a federal district court in Arkansas for a writ of habeas corpus. The writ was denied, the court holding that petitioner had not exhausted available state remedies, because the question of whether the accused's constitutional rights were violated by the trial court's denial of process to compel the attendance of the jury commissioners had not been raised in his motion for a new trial nor in his bill of exceptions, and therefore was not brought to the attention of the state supreme court, was not litigated therein, and was therefore waived. Assuming that accused originally had a right under the Fourteenth Amendment to have compulsory process of this kind, the court concluded that constitutional rights may be waived at trial unless related to a substantial claim going to the very foundation of a proceeding by denying one a fair trial, and such was not the case here. It was also held that the fact that accused had sought in a proceeding under the Uniform Post-Conviction Act to raise the question now urged did not constitute an exhaustion of state remedies.

HENLEY, District Judge.

On October 22, 1956, Luther Bailey, a Negro man, hereinafter called petitioner, was adjudged guilty of the crime of rape upon the person of a white woman by the Circuit Court of Pulaski County, Arkansas, First Division, and was sentenced to death; the Supreme Court of Arkansas affirmed, Bailey v. State, 227 Ark. 889, 302 S.W. 2d 796, and the Supreme Court of the United States denied certiorari, Bailey v. Arkansas, 355 U.S. 851, 78 S.Ct. 77, 2 L.Ed.2d 59. Subsequently petitioner filed in the sentencing court a petition for relief from his conviction under the procedure prescribed by Act 419 of the 1957 General Assembly of the State of Arkansas, which statute is the Arkansas version of the Uniform Post-Conviction Procedure Act.[1] The Circuit Court denied the petition, and its action in that regard was affirmed by the Supreme Court of Arkansas, Bailey v. State, Ark., 313 S.W.2d 388. The Supreme Court of the United States again denied certiorari, Bailey v. Arkansas, 79 S.Ct. 101, the mandate providing, however, that the

1. Insofar as here pertinent that statute provides that: "Any person convicted of a felony and incarcerated under sentence of death or imprisonment who claims that the sentence was imposed in violation of the Constitution of the United States or the Constitution or the laws of this State, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under a writ of habeas corpus, writ of error coram nobis, or other common law or statutory remedy, may institute a proceeding under this Act to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction or in any other proceeding that the petitioner has taken to secure relief from his conviction.
* * *"

denial was "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court." The petition for writ of habeas corpus with which we are now concerned was filed by petitioner in this Court on November 22 of the current year.

[*Compulsory Process*]

Petitioner asserts that he is entitled to relief from the judgment of the Pulaski Circuit Court for the reason that such judgment was obtained in violation of rights guaranteed to him by the 14th Amendment of the Constitution of the United States. More specifically, petitioner contends that the trial court wrongfully refused him compulsory process to compel the attendance of certain individuals who have served as jury commissioners in Pulaski County to testify in support of his motion to quash the regular and special panels of the petit jury from which trial jurors in his case were to be drawn, which motion was based upon the theory that the selection of those panels had been characterized by unlawful discrimination against Negroes.

At the conclusion of an informal conference held in chambers on November 24, and attended by counsel for both parties, an order was issued commanding the respondent to show cause why the writ of habeas corpus should not issue as prayed for by petitioner, and staying execution of the death sentence until the petition should be finally disposed of by this court.[2] The order to show cause was made returnable on November 28, and hearing on the petition and the response to the order to show cause was set for November 29.

Respondent timely filed a response, in which he stated that by virtue of a commitment from the Circuit Court of Pulaski County petitioner was being held in the Arkansas State Penitentiary awaiting execution. Attached to the response were certified copies of the commitment, of the mandates of the Supreme Court of Arkansas affirming the judgments of the circuit court that have been mentioned, and the mandates of the Supreme Court of the United States denying certiorari. At the same time respondent filed a memorandum brief in opposition to the petition, and petitioner likewise filed a memorandum brief in support of his position.

At the hearing on November 29 it was agreed that the transcripts of the record in the original case and in connection with petitioner's application under Act 419 of 1957 should be considered as introduced in evidence, with leave to either party in the event of an appeal to bring before the appellate court, or courts, such portions of those transcripts as might be deemed essential. Said transcripts have now been considered, along with all other papers in the case, the briefs of the parties, and the oral arguments.[3]

As stated, the only basis for the petition is the contention that the constitutional rights of petitioner were violated by the Pulaski Circuit Court when it denied him compulsory process to compel the attendance of the jury commissioners; and while we find, as did the circuit court, in connection with petitioner's application under Act 419, that there was a denial of such process, nevertheless, we are convinced that the petition must be denied.

[*Exhaustion of State Remedies*]

It is well settled, and 28 U.S.C.A. § 2254 specifically provides that, except under unusual circumstances, a State prisoner may not obtain relief from the judgment against him without first exhausting his available State remedies. Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469; Arsenault v. Gavin, 1 Cir., 248 F.2d 777; United States ex rel. Kozicky v. Fay, 2 Cir., 248 F.2d 520, certiorari denied 356 U.S. 960, 78 S.Ct. 997, 2 L.Ed.2d 1067; Ex parte Lee, D.C.R.I., 123 F.Supp. 439, affirmed Lee v. Kindelan, 1 Cir., 217 F.2d 647, certiorari denied 348 U.S. 975, 75 S.Ct. 538, 99 L.Ed. 759; Waldon v. Swope, 9 Cir., 193 F.2d 389. As stated in United States v. Fay, supra, "This usually entails asserting the merits of the alleged deprivation of federally guaranteed rights at each step in the state courts and an attempt to obtain relief from the United States Supreme Court." 248 F.2d at page 521.

Under the authorities above cited in order to exhaust his available State remedies petitioner was required to present to the Supreme Court of Arkansas in connection with his first appeal his contention that the trial court erred in refusing his request for process for the jury commissioners. This he did not do. He failed to raise

2. In the course of the conference the respondent waived formal notice to the filing of the petition.

3. Actually, both transcripts were made available to the Court in the course of the conference held on November 24, and the Court was generally familiar with their contents prior to the hearing five days later.

the question either in his motion for a new trial or in his bill of exceptions.

True, petitioner advanced his present contention in his application for relief under Act 419, and in the course of the proceedings in connection therewith it was established that the circuit judge had directed the clerk of the circuit court not to issue subpoenas for the commissioners because they would not be allowed to testify, and the motion to quash would be decided on the basis of the records in the clerk's office.[4] It was held on appeal, however, that the alleged error could not be considered in a proceeding under Act 419 because the scope of that Act is limited to alleged errors which have not been "previously and finally litigated or waived in the proceedings resulting in the conviction", and that the alleged error in denying process had been either finally litigated or waived in the original proceedings. Bailey v. State, supra, Ark., 313 S.W.2d 388. While the Supreme Court, evidently tracking the language of the statute, said that the error, if any, had been either litigated or waived in connection with the first appeal, it is clear from the original opinion, Bailey v. State, 227 Ark. 889, 302 S.W.2d 796, and from the record before us that the matter was not brought to the attention of the Supreme Court, was not litigated therein, and was, therefore, waived.

[*Constitutional Rights Waived*]

Assuming for present purposes that petitioner's right to have process to compel the attendance of the jury commissioners was a right protected by the due process clause of the 14th Amendment, nevertheless, as Justice Frankfurter pointed out in his concurring opinion in Brown v. Allen, supra, 344 U.S. 443, 503, 73 S.Ct. 397, 444: "Normally rights under the Federal Constitution may be waived at the trial, Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268, and may likewise be waived by failure to assert such errors on appeal. Compare Frank v. Mangum, 237 U.S. 309, 343, 35 S.Ct. 582, 59 L.Ed. 969 * * *." See also Waldon v. Swope, supra, and Carruthers v. Reed, 8 Cir., 102 F.2d 933, certiorari denied 307 U.S. 643, 59 S.Ct. 1047, 83 L.Ed. 1523.

While the rule just stated may not be applicable to one of those extraordinary cases in which a substantial claim goes to the very foundation of a proceeding, as in Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543, this is not such a case. Here there is no indication that anyone concerned was trying to prevent the defendant from having a fair trial, or that he was denied a fair trial; he was represented by appointed counsel from the time of his arraignment, more than a month before the trial date, and he was afforded process for certain witnesses, the denial of process for the jury commissioners being evidently purely collateral and incidental to the circuit court's determination that the motion to quash should be decided solely upon the basis of the records in the office of the circuit clerk bearing upon the selection of jurors. In its rulings on questions of evidence during the course of the trial proper, and in its instructions to the jury the circuit court appears to have been careful to protect all of the legitimate rights of the petitioner, and the verdict and judgment were supported by the evidence.

[*Post-Conviction Act*]

The fact that petitioner sought unsuccessfully to raise the question that he now urges in a proceeding under Act 419 does not constitute an exhaustion of State remedies and does not help him here. He had an adequate State remedy at the time of his original appeal and he did not pursue it. In this aspect this case resembles United States ex rel. Stewart v. Ragen, 7 Cir., 231 F.2d 312, in that case a State prisoner filed in the State courts an application for post-conviction relief under the Illinois statute, S.H.A. ch. 38, § 826 et seq.; his application was denied, and he did not appeal; some years later he com-

4. The bill of exceptions covering the original trial reflects that the motion to quash the jury panel was filed on the morning that the trial was scheduled to begin, and that a hearing on that motion was the first order of business. The petitioner called the deputy circuit clerk as a witness, and he testified in considerable detail as to the number of Negroes who had been called for jury service during the years referred to in the motion, and the court supplied some information himself. After that testimony had been taken, counsel for petitioner said: "I now request the Court to allow the Jury Commissioners for all the terms from the 1952 March term until the 1956 March term, inclusive, to testify as to the matters and allegations set out in my motion to quash the regular and the special panel of petit jurors." The Court said: "The Court is going to overrule that motion. The record will reflect what they did." To that ruling the defendant objected and excepted, and the Supreme Court considered that ruling on appeal. The impropriety of the refusal to permit the commissioners to testify is not now urged before this court.

menced a similar proceeding based upon substantially the same grounds, and was denied relief on the basis of res adjudicata; petitioner appealed, and the judgment was affirmed and certiorari denied by the Supreme Court of the United States. Petitioner then brought habeas corpus in the federal court, and it was held that he had not exhausted his State remedies. The Court said: "The fact remains, the denial of his first petition under the Illinois Post-Conviction Hearing Act stands unreversed and is final and conclusive. Petitioner, a prisoner under a State Court judgment, did not exhaust his State Court remedies, a condition precedent to federal jurisdiction." 231 F.2d at pages 312, 314.

It is, therefore, considered, ordered and adjudged that the order to show cause heretofore entered be, and the same hereby is, vacated, and that the petition for a writ of habeas corpus be, and the same hereby is, denied.

It is further ordered that petitioner's oral application for a certificate of probable cause, made in the course of the oral argument heard on this date, be, and the same hereby is, denied.

It is further ordered, however, that the Clerk of this Court supply to counsel for petitioner, upon request, and without charge, such portions of the record as he reasonably may require to make application for a certificate of probable cause to one of the judges of the Court of Appeals for this Circuit, or to the Court of Appeals itself, or to the Circuit Justice.

TRIAL PROCEDURE
Juries, Confessions—Florida

John FRAZIER v. STATE of Florida

Supreme Court of Florida, November 21, 1958, 107 So.2d 16.

SUMMARY: A Negro man, convicted and sentenced to death for the murder of a Negro woman, alleged on appeal to the Florida Supreme Court that Negroes had been excluded from the grand and petit juries in violation of the Fourteenth Amendment. The court refused to review the question, holding that it could not be raised for the first time on appeal. Defendant also contended that a confession had been erroneously admitted at the trial despite his testimony that it was given out of fear of threats by officers to beat and lynch him. However, defendant's testimony indicated that he had not been abused or tortured and "didn't pay no attention" if any threats were made. A deputy testified that he might have suggested that defendant tell what he knew because "it would be easier on you" or "will save holding you any length of time and questioning you." The Supreme Court affirmed the judgment, stating that the voluntary character of a confession is for the trial court's determination and that there was no abuse of discretion in the admission of the confession as one induced by an adjuration to tell the truth and not by threat or promise of benefit.

TRIAL PROCEDURE
Juries—Louisiana

STATE of Louisiana v. George FLETCHER

Supreme Court of Louisiana, November 10, 1958, 106 So. 2d 709.

SUMMARY: A Negro appealed a narcotics conviction to the Louisiana Supreme Court, alleging error by the trial court in denying his motion to set aside the general venire and the petit jury panel on the ground that Negroes had been systematically excluded by the parish jury

commission. At the motion hearing, the jury commission chairman explained the procedure followed in selecting the names for the general venire. He also testified that no special attention was paid to race; that no attempt was made to ascertain the number of white or Negro persons who responded to the subpoenas; that he did not know what proportion of the names placed in the wheel were white and Negro; and that no effort was made at any time to check whether the wheel contained the names of Negroes. Appellant not having contradicted this testimony by having shown how many names of Negroes had been placed in the wheel or called for jury duty, the Supreme Court concurred in the trial court's conclusion that he had failed to sustain the burden of proving his charges or to overcome the presumption that the commissioners as public officials had fulfilled their duties legally. It was faulty to assume, the court said, that the state was required to show that there were Negroes called for jury service. The conviction was affirmed.

McCALEB, Justice.

Appellant was charged, tried and convicted of violating R.S. 40:962 in that he illegally possessed a narcotic drug, to wit, one marijuana cigarette and particles of marijuana. Following a sentence to serve five years in the State Penitentiary at hard labor, he took this appeal relying on four of the five bills of exceptions he reserved at the trial for a reversal of his conviction.[1]

Appellant's main Bill, No. 1, was taken to the denial of his motion to set aside the array and challenge to the special jury venire.

The motion is based on two separate contentions. The first of these, which is that the drawing of the special jury venire for Section "H" of the Criminal District Court during October, 1957 did not conform with the provisions of R.S. 15:191–15:201 and R.S. 13:1382, has been abandoned in consequence of our ruling in State v. Murphy, 234 La. 909, 102 So.2d 61, where the same points were raised and decided adversely to appellant.

[*Exclusion of Negroes Charged*]

The second contention is that there was a systematic and unlawful exclusion of Negroes by the Jury Commission from the general venire and the petit jury panel, which was to try appellant (a Negro), because of their race and color and that this exclusion was accomplished by arbitrary and disproportionate limiting of their number by said jury commissioners, who had not sufficiently acquainted themselves with the qualifications of all potential jurors in the Parish of Orleans.

The principle is firmly established in this country that racial discrimination in the selection of juries for the presentment and trial of criminal cases is inimical to constitutional guarantees, the Supreme Court of the United States declaring in its latest opinion (Eubanks v. Louisiana, 356 U.S. 584, 78 S.Ct. 970, 972, 2 L.Ed.2d 991, decided May 26, 1958) that:

> "In an unbroken line of cases stretching back almost 80 years this Court has held that a criminal defendant is denied equal protection of law as guaranteed by the Fourteenth Amendment if he is indicted by a grand jury or tried by a petit jury from which members of his race have been excluded because of their race."

Hence, our only concern here is to determine whether appellant has supported the charges contained in his motion by evidence justifying the conclusion that the fair mode of jury selection provided by our law (R.S. 15:194–196) has been administered in such a manner that gross inequalities have occurred. Hill v. State of Texas, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559; State v. Perkins, 211 La. 993, 31 So.2d 188; Cassell v. Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839; State v. Green, 221 La. 713, 60 So.2d 208.

[*Jury Commissioner's Testimony*]

To sustain his claim, appellant called to the stand Mr. Henry Evans Maloney, Chairman of the Jury Commission, Parish of Orleans,[2] whose testimony establishes the following facts: The names of the persons who are placed on the general venire for jury service in the Parish of Orleans are secured by the Jury Commission from the city directory, the telephone directory

1. Bill No. 2 has been abandoned.

2. It was stipulated between appellant's counsel and the prosecution that, if the four other jury commissioners testified, their evidence would be the same as that of Mr. Maloney.

and the rolls of the registrar of voters. When the names are secured, a subpoena is sent to each prospective juror to appear before the Commission. On the back of each subpoena is listed certain data which the prospective juror is required to fill out and bring with him at the time of his appearance. These include his name, residence, telephone number, name of his employer, business telephone number, occupation, sex, age and race. He is also questioned as to his citizenship, the duration of his residence in Orleans Parish, whether he is a registered voter, whether he has ever been convicted of a felony or is under indictment, interdiction or other pending charges; whether his hearing or eyesight is impaired, whether he is physically disabled or incapacitated; when he last served on a jury panel in Orleans Parish and the season of the year during which it will be most convenient for him so serve. When this subpoena containing answers to the questions is received, a card is made and the subpoena is attached thereto. The names and addresses of the persons selected are then inscribed on small pieces of paper and these slips are periodically placed in the general venire wheel. Although the race of the person can be ascertained by looking on the back of the subpoena, Mr. Maloney emphatically stated that the Commissioners pay no special attention to the race of the person; that he has no knowledge of the proportion of white and Negro persons whose names are placed in the wheel and that no effort is made to check and see if the wheel contains the names of Negroes. He further said that he did not know the percentage of the Negro population of New Orleans (it is shown that there are 459,400 whites and 227,300 Negroes by the 1950 census) and that, when notices are sent out, no attempt is made to ascertain the number of white or Negro persons who respond to the subpoenas or thereafter to check the names in the wheel with the subpoenas to determine whether Negroes are represented.

[*Registration Officer's Testimony*]

Mr. Edward Rodriguez, Chief Deputy of the Registration Office for the Parish of Orleans, was also called by appellant's counsel and he testified that there are 198,430 registered voters in the Parish and that, of this total, 167,674 are members of the white race and 30,756 are Negroes.

The jury wheel contained 1,549 names but appellant submitted no proof at the hearing of the motion, notwithstanding that evidence was available (by subpoena duces tecum for the records of the jury commission) to show the number of Negroes whose names were included in the wheel. Of the total number contained in the jury wheel, 950 names were drawn and allotted to the eight sections of the Criminal District Court and these persons were summoned for jury duty. Of this number 372 served as jurors, the balance of 578 persons being excused. But here again no attempt was made by appellant to show how many, of those called for jury duty, were Negroes.

[*Conclusion of Trial Court*]

The trial judge concluded that neither a systematic inclusion nor exclusion of Negroes had been established by the evidence and we are in accord with this view. It is, of course, settled that an accused claiming a denial of equal protection of the law because of systematic exclusion or inclusion of members of his race has the burden of proving the charges, it being presumed that public officials do their duty in accordance with law. State v. Perkins, supra, and State v. Palmer, 232 La. 468, 94 So.2d 439.

According to the uncontradicted evidence of Mr. Maloney, there does not appear to be any racial discrimination in selection of persons who are ultimately called for jury service in Orleans Parish. The names of these persons are initially secured from the New Orleans City Directory, the Registration rolls and the telephone directory, sources from which it is fair to assume a large segment of qualified Negro citizens, as well as white persons, will be found, the jury commission being without knowledge, at the time the names are obtained, concerning the race of the persons summoned. This method of selection is in keeping with the views expressed by the Supreme Court of the United States in the Cassell, Hill, Eubanks and other cases, as there cannot be purposeful exclusion or inclusion of races unless it is either deliberate or the circumstances are such as to render the conclusion inescapable that the commission has, by its action or inaction, established a pattern which invariably produces discrimination.

The argument of appellant's counsel in this Court seems to be that, since the State did not show that Negroes were included in the general

venire and how many of them were called for service on the special petit jury venire, which had been summoned to try appellant, it must be concluded that there was systematic and unlawful exclusion of Negroes.

[*Faulty Assumption of Appellant*]

This contention rests on the faulty assumption that the State was required to show that there were Negroes called for jury service, when the burden was on appellant to show that they were purposely excluded or included. The difference between this case and the Eubanks, Cassell and other cases relied on by counsel is that it was shown in all those matters that, although the communities in which the juries were drawn contained a substantial number of Negro citizens, no Negroes were ever called for jury service, or a token number were systematically included so as to avoid the charge of a denial of equal protection. In such instances, the Supreme Court has resolved that it will not do for the public officials to say that they are not acquainted with any qualified Negroes because, when it is shown that no Negroes are ever called, it evidences a complete neglect of duty in areas where Negroes compose a large segment of the citizenry.

The third bill of exceptions was taken to the refusal of the judge to include a requested special charge submitted by appellant in the general charge and further because the general charge did not include a statement relative to the law of conspiracy.

We find no substance in the bill. An examination of the general charge of the judge shows that it covered the essentials of appellant's requested special charge which was to the effect that, in order for appellant to be held criminally accountable for the narcotics allegedly found on his person, the State must prove that he possessed them wilfully, knowingly and deliberately.

The request to include a statement concerning the law of conspiracy in the general charge was likewise properly denied as being irrelevant. Appellant was charged with the substantive offense of possessing narcotics and not with the separate and distinct crime of a conspiracy to possess them, which is composed of different elements.

[*New Trial Motion Denied*]

Bill No. 4 was taken to the denial of appellant's motion for a new trial. This motion merely reiterates the complaints hereinabove considered and rejected and, hence, it presents nothing for further discussion.

In connection with his motion for a new trial, appellant applied for the issuance of a subpoena duces tecum for records of the jury commission relative to the drawing of all petit jury venires, including the lists containing the names of the jurors drawn from the jury wheel for duty during the month of October, 1957 and the subpoenas issued by the jury commissioners to each of the persons whose names appeared on the lists. The State excepted to the application for the subpoena on the ground, among other things, that it was filed too late and, when this exception was sustained, appellant reserved his Bill No. 5.

The exception of the State was properly maintained as the attempt to secure a subpoena duces tecum was merely a continuation after conviction of appellant's motion to quash the general and special jury venires. Appellant had ample opportunity either before or during the hearing of his motion to have these records of the jury commission produced, if his counsel had felt that they would have been helpful to his claim of racial discrimination. No explanation for the delay in making the application is offered but, whatever the reason, it is sufficient to say that it came too late.

Article 202 of the Code of Criminal Procedure (R.S. 15:202) provides that:

> "All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner, * *".

While the three day rule here stated has been qualified (see State v. Chianelli, 226 La. 552, 76 So.2d 727 and State v. Butler, 227 La. 937, 81 So.2d 1), the requirement that any such attack must be urged and disposed of before trial remains in full force.

The conviction and sentence are affirmed.

TRIAL PROCEDURE
Juries—Louisiana

STATE of Louisiana v. Joseph Oliver JENKINS.

Supreme Court of Louisiana, December 15, 1958, 107 So.2d 632.

SUMMARY: On the trial in a Louisiana state court of a Negro indicted for the murder of a white man, defendant moved to quash the indictment, the grand jury panel, the grand jury, and the petit jury venire, on the grounds that the grand jury and petit jury venire had been illegally drawn. Defendant also alleged that Negroes had been systematically excluded from the grand jury. The motions were overruled, defendant was convicted, and he appealed. The Supreme Court of Louisiana affirmed, finding that the statutory method for drawing juror names had been observed, and holding that, since there was no showing of a great wrong working irreparable injury, there was no legally sufficient cause to challenge the venire on the ground of any alleged defect in the manner of selecting the jury or in its composition. It was also held that there was no evidence to support the allegation of systematic exclusion of Negroes from the grand jury. Though only three Negroes served on the grand jury and none on the petit jury, there was no evidence as to the percentage of parish Negro and white people qualified to serve as jurors, and several Negroes were on the petit jury venire but were excused for non-racial reasons.

TRIAL PROCEDURE
Grand Juries—Louisiana

STATE of Louisiana v. Joseph RUE.

Supreme Court of Louisiana, December 15, 1958, 107 So.2d 702.

SUMMARY: A Negro was indicted by an Orleans Parish, Louisiana, grand jury (including three Negro members) for the crime of aggravated rape. Defendant moved to quash the indictment, alleging that: (1) he had been deprived of due process of law and equal protection of law because the statute regulating the drawing and impaneling of a grand jury in Orleans Parish confers on the criminal judge an exclusive discretion to select the members of the grand jury, which discretion might be exercised arbitrarily and discriminatorily; and (2) the statutory method of selecting grand jurors in Orleans Parish differs from that in other parishes, thus depriving defendant of equal protection of the law. The motion was denied, and he was convicted by a petit jury which included two Negro members. He appealed the denial of the motion. The charge that the statute is unconstitutional because it might be discriminatorily applied was held untenable by the Supreme Court of Louisiana, which pointed out that no discrimination in fact had been alleged. The court also held that the difference in the method of jury selection in the Orleans Parish did not render the system unconstitutional, since defendant had not been prejudiced by the difference in methods.

TRIAL PROCEDURE
Petit Juries—United States Courts

Ernest SMITH v. UNITED STATES of America.
Beatrice K. BROWN v. UNITED STATES of America.

United States Court of Appeals, Fourth Circuit, December 16, 1958, 262 F.2d 50.

SUMMARY: At the trials of Negroes for forging government checks, their counsel asked prospective jurors on *voir dire* examination if any of them were members of "any organization dedicated toward racial hate," including the Ku Klux Klan, White Citizens Council, and Defenders of State Sovereignty. The court would not permit answers to this question but asked, instead, a general question as to bias or prejudice such as would prevent a fair and impartial trial and a true verdict according to law and evidence. The Court of Appeals for the Fourth Circuit reversed and remanded, holding that the jurors should have been permitted to disclose whether they were members of the organizations specified.

Before SOBELOFF, Chief Judge, HAYNSWORTH, Circuit Judge, and WATKINS, District Judge.

PER CURIAM.

The appellants were convicted in separate jury trials of forging and uttering government checks. The District Court denied a motion to appeal in forma pauperis, but leave was given by this Court to proceed in forma pauperis and the cases were heard here on their merits. Because a single issue is involved in each case, they were heard together.

The appellants are each Negroes. At their respective trials in June, 1958, at Norfolk, Virginia, counsel for Appellant Brown asked prospective jurors on the voir dire examination the following question: "Are there any members of the jury panel who are a member of any organizations dedicated toward racial hate, such as the Ku Klux Klan, White Citizen's Council, or similar organizations?" The same lawyer at the trial of Appellant Smith asked prospective jurors on their voir dire examination the question: "Is there anybody on the jury panel who is a member of the White Citizen's Council, Defenders of State Sovereignty, or any similar organization?" The Court would not permit the prospective jurors to answer either question. Instead, the Court asked the general question as to whether any juror was sensible to any bias or prejudice which would, in any way, prevent such juror from giving to both the United States and the defendant a fair and impartial trial and a true verdict rendered according to the law and evidence. The failure of the trial Court to permit prospective jurors to answer the specific question as to membership in these organizations is assigned as reversible error.

[*Contentions of Parties*]

The government says that the trial judge has a broad discretion in questions permitted on voir dire examination, and that the general question as to prejudice was sufficient. The appellants say that they are entitled to know the specific facts relating to membership in these organizations in order to intelligently exercise their peremptory challenges, and that the general question as to whether the juror believes himself to be prejudiced is not sufficient; and that the right to challenge would be empty if the right to question as to material facts is abridged.

We think that the learned judge should have permitted the jurors to disclose whether they were members of these organizations and that it was reversible error to refuse to do so. Refusal to permit questions on voir dire examination, asked in good faith, as to membership in the Ku Klux Klan has been held to be reversible error in a long line of cases which are collected in 31 A.L.R. 411; 158 A.L.R. 1362; and 54 A.L.R.2d 1211.

If the questions were not properly framed, the Court could have amended them so as to elicit the desired information as to membership in these organizations.

We see no merit in other assignments of error. The judgment in each case is reversed and each case is remanded to the District Court for further proceedings.

Reversed and remanded.

LEGISLATURES

EDUCATION
Governor's Address—Arkansas

Governor Orval Faubus of Arkansas, in his inaugural speech of January 13, 1959, recommended a state constitutional amendment permitting a system of student aid on a local option basis and changing the method in which school district millage rates are set. He also recommended legislation allowing districts to adopt a student aid system in the interim before the popular vote on the proposed amendment and providing for participation in the state's teacher retirement system by private school teachers. Extracts from the speech are reproduced below.

In the field of controversy, state versus federal power, I wish to recommend the following:

1. A constitutional amendment which will provide that by vote of the people, any school district may substitute a system of student aid for the present system. The amendment will simply provide that once the student aid system is adopted, the school board will pay to each student his pro-rata share of local funds, and the state will pay to each student his pro-rata share of state funds. The students may then seek their education in any school of their own choosing.

This amendment will simply and basically provide for local option on the district level, when the people are faced with the problem of forced integration, and provides for a just, workable, and feasible substitute for our present system of public schools. It will avoid the step taken in some states—that of providing for the state-wide abolition of the public school system. It also permits the continuation of segregated schools where there is no federal interference, and it permits the establishment of integrated schools where the people choose to do so. But its main purpose is to make possible the continued local and state support of education on a segregated basis, where the people so choose.

The amendment will also make certain changes in the method by which millage rates are now set. It will provide that where the school board has recommended a certain millage rate and the people of the district, by their vote, disapprove the board's recommendation, the millage will then revert to 30 mills, or the millage in effect at the time the vote is taken, whichever is the lower figure. This will provide a more flexible means of lowering the millage rates in certain districts; yet, it leaves the people of any district free to approve any millage rate they feel the district needs.

2. I recommend that this General Assembly provide by legislation for the adoption of a student aid system by any district that so chooses. If such a measure becomes law, it will be on the statute books and ready for use at any time it becomes necessary in any district of the state. I feel that this is needed to cover the interim period between now and the time the people can vote on the adoption of the proposed amendment.

3. I recommend that you adopt legislation at this session providing for participation in the teacher retirement system by teachers who are now, or who may be in the future, employed by private educational institutions. I feel that under the conditions which now exist in this state, and which may exist for some time in the future, this is necessary to protect the retirement interests of all teachers in the field of education.

EDUCATION
Colleges and Universities—Georgia

Act No. 11 (S.B. 3) of the 1959 Session of the Georgia General Assembly, approved by the governor February 4, 1959, sets age limits for admission to the University of Georgia.

AN ACT to govern the admission of students to the University of Georgia and all of its branches as to age; to declare exceptions thereto; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. No person shall be admitted initially to any college or undergraduate school of the University of Georgia or any of its branches after such person has reached twenty-one (21) years of age, and no person shall be admitted initially to any graduate or professional school of the University of Georgia or any of its branches after such person has reached twenty-five (25) years of age: Provided, however, that any person engaged in teaching or instructing in any elementary or high school in this state, public or private, and who desires to pursue courses of study to better qualify himself therefor, may be admitted to any college, undergraduate, graduate, or professional school of the University of Georgia or any of its branches, notwithstanding his age, subject, however, to such limitations or regulations as the Board of Regents may prescribe. Provided, further, that persons who may be found by the Board of Regents to possess such ability and fitness, so that their further education at public expense is justified, may be admitted to any such undergraduate, graduate or professional school notwithstanding such age limitation; provided, further, that persons who have been prohibited from making application for admission to College before reaching the age of 21 or 25, respectively, because of military service in the Armed Forces of the United States, shall not be denied admission because of age.

Section 2. The Board of Regents shall provide by regulation for the enforcement and administration of this Act.

Section 3. All laws and parts of laws in conflict with this Act are hereby repealed.

EDUCATION
Colleges and Universities—Georgia

Act No. 8 (S.B. 2) of the 1959 Session of the Georgia Legislature, approved by the governor on February 3, 1959, gives the governor the power to close state colleges and universities when necessary to preserve order.

AN ACT to implement the powers of the Governor as conservator of the peace and to authorize the Governor to close any school or institution or any branch or department thereof under the control of the Board of Regents of the University system of Georgia; and for other purposes.

Be it enacted by the General Assembly of Georgia:

(1) The Governor as the conservator of the peace shall have the authority to close any school or institution, or any branch or department thereof under the control of the Board of Regents of the University System of Georgia, whenever he shall find, of which he shall be the sole judge, that the continued operation of any such school or institution or any branch or department thereof, is likely to result in or cause violence or public disorder in the community in which such school is situated, or that it is necessary to preserve the good order, peace and dignity of the State, or any subdivision thereof.

(2) All laws and parts of laws in conflict with this Act are hereby repealed.

EDUCATION
School Closing—Georgia

Act No. 7 (S.B. 1) of the 1959 Session of the Georgia General Assembly, approved by the governor on February 3, 1959, gives the governor the power to close public schools when necessary to preserve order.

AN ACT to implement the power of the Governor as conservator of the peace throughout the State; to define such powers with respect to the operation of public schools; to prevent violence and disorder in connection with the operation of public schools; to provide for the closing of public schools and for the education of pupils from such schools; to confer power upon the Governor with respect to such schools; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. Whenever the Governor shall determine, from such facts as he may find to exist, of the sufficiency of which he shall be the sole judge, that the continued operation of any public school in any county, city or independent school district is likely to result in or cause violence or public disorder in the community in which such school is situated, or that it is necessary to preserve the good order, peace and dignity of the State, or any subdivision thereof, that any such school be closed, he shall make public proclamation of such findings, and such school shall thereupon be closed.

Section 2. If the Governor shall determine from such facts as he may find to exist, of the sufficiency of which he shall be the sole judge, that the closing of any public school, as authorized by Section 1 of this Act, has become necessary because of such conditions resulting from the transfer or assignment of one or more pupils to such school, and that the continued operation of the school theretofore attended by any pupil so assigned or transferred, or to which any such pupil should or would have been assigned in the normal operation of the public schools in the county, city or independent school district of which such school is a part, is likely to result in or cause violence or public disorder in the community in which such school is situated, or disturb the good order, peace and dignity of the State or any subdivision thereof, the Governor shall make public proclamation of such findings and such school formerly attended by any such pupil so transferred or assigned, or to which any such pupil should or would have been assigned in the normal operation of the system, shall likewise be closed.

Section 3. After the issuance of such a proclamation by the Governor under either of the foregoing sections, it shall be unlawful for the public authorities of any such county, city or independent school district to operate any school to which such proclamation relates, and it shall be unlawful for any State, county or municipal officer or official, or any person occupying a position of public employment as a school teacher or otherwise, to participate in the operation of any such school as a public school; and the expenditure of public funds of the State, any county or any city or municipal corporation or other political subdivision for the operation of any such school shall also be unlawful.

Section 4. Whenever any public school is closed pursuant to this Act, the Governor shall, by executive order or proclamation, provide for the protection and preservation of the property occupied by such school, including the buildings thereon.

Section 5. Whenever any school is ordered by the Governor, pursuant to the foregoing provisions of this Act, to be closed, the public authorities of the county, city or independent school district shall arrange for the transfer of the pupils assigned to any such school to other public schools.

Section 6. If the public authorities of any county, city or independent school district in which is situated any public school closed pursuant to the provisions of this Act, because of the lack of physical or other facilities or for other reasons, cannot transfer the pupils attending or assigned to any such closed schools to other schools in the system operated by such county, city or independent school district, they shall so certify to the Governor and shall set forth in the certification the names of the pupils who cannot be transferred to other schools in

the system and the facts relating thereto. If the Governor shall approve the findings of the public authorities of any such county, city or independent school district, he shall provide for an educational grant from State and local funds, as authorized by the Act approved February 6, 1956 (Ga. L. 1956, p. 6) to each such pupil who cannot be so transferred or assigned to an existing public school. Such grant shall be payable in such amount and under such regulations as the order of the Governor may provide, and shall be for the education of each such child or pupil in such schools other than public schools as such child or pupil may attend.

Section 7. The powers conferred upon the Governor by this Act shall be cumulative of those conferred upon him by the aforesaid Act of February 6, 1956.

Section 8. Any person who shall violate any provision of this Act, and any person who shall continue to operate, or who shall attempt to operate, as a public school, any school closed under this act or shall attend, or cause any one else to attend, any such closed school, or attempt so to do, shall be guilty of a misdemeanor, and on conviction shall be punished as provided by Section 27-2506 of the Code of Georgia of 1933.

Section 9. All laws and parts of laws in conflict with this Act are hereby repealed.

EDUCATION
Tax Allowances—Georgia

Act No. 3 (HB 15) of the 1959 session of the Georgia General Assembly, approved by the governor on February 3, 1959, provides that contributions to private educational organizations shall be allowed "as credit against, and deducted from the tax otherwise payable" under the Georgia income tax statute.

AN ACT to amend chapter 31 of title 92 of the Georgia Code of 1933 as heretofore amended; to provide for a credit against or deduction from the income tax otherwise payable under said chapter 31 of title 92 of said code as amended of the amount of any contribution made by the taxpayer during the taxable year to any corporation, foundation or trust which, at the time of such contribution, has a certificate from the State Revenue Commissioner that it is organized and operated exclusively for educational purposes and that no part of its net income inures to the benefit of any private shareholder or individual; and for other purposes.

Be it enacted by the General Assembly of Georgia and it is hereby enacted by authority of the same:

Section 1. That Chapter 31 of Title 92 of the Georgia Code of 1933 as amended be and the same is hereby further amended by adding after Section 92-3111 thereof a new Section 92-3111(a) to read as follows:

92-3111(a) Credit against tax for contribution to educational organizations. There shall be allowed as credit against, and deducted from the tax otherwise payable under this chapter by any taxpayer an amount equal to any contribution which such taxpayer shall have paid, during the taxable year on account of which such tax is payable, to any corporation, foundation or trust if, but only if, at the time of such payment such corporation, foundation or trust has in full force and effect a certificate from the State Revenue Commissioner certifying under this section that such corporation, foundation or trust is organized and operated exclusively for educational purposes and that no part of the net income of said corporation, foundation or trust inures to the benefit of any private shareholder or other individual. The issuance of such certificate shall be at the discretion of the State Revenue Commissioner. The existence of such certificate from the State Revenue Commissioner is a condition precedent to the credit allowed by this section 92-3111(a) and no such

credit shall be allowed unless the corporation, foundation or trust to which such contribution is paid holds such certificate in full force and effect at the time such payment is made. If a credit is allowed under this section, no deduction shall be allowed under section 92-3109 as amended for the same payment.

Section 2. That all laws and parts of laws in conflict herewith are hereby repealed.

EDUCATION
Governor's Address—Virginia

Following judicial reverses of his administration's program of "massive resistance" to public school desegregation, Governor J. Lindsay Almond, Jr., called a special session of the Virginia General Assembly. In addressing the Assembly on January 28, 1959, he recommended legislation to deal with school problems, as follows:

I am not aware of any crisis in the history of Virginia more grave nor any emergency creating a more impelling necessity for the convening of the representatives of our people. Only under the impact of a situation fraught with consequences so directly weighted against the peace, happiness and welfare of the citizens of this Commonwealth would I, with such short notice, have exercised the constitutional prerogative which brings you here with personal sacrifice and inconvenience.

It is with prayerful reverence that I approach the responsibility of the task of addressing you, realizing that in so doing I speak to all of the people of the greatest of sovereign states—a state embattled and beleaguered, fighting with honor, nobility of purpose, and fidelity to principle—and, at times, it seems, fighting alone—to defend, restore and preserve the rights of every state federated into the sisterhood of states under our constitutional system of government.

Encompassed by the iron will of arrogated power, buffeted upon the storms of an uneven contest, pierced with the daggers of political expediency and battered by the unholy alliance of a conspiracy to destroy the Constitution, Virginia, true to the faith of the founding fathers and refusing to desecrate her heritage, must never recede in this struggle to preserve her rights nor suffer her voice to be stifled in the councils of the Nation.

On the highest plane of honor and dedication to fundamental principles, buttressed by sound and vital constitutional precepts, Virginia has done more than any other state in the Union to impress upon the hearts and minds of the American people that her struggle is theirs, and that it is for the common cause of the restoration of government by law and not by men that she fights and will continue to fight.

[*Obligation of Nation*]

The obligations and responsibility for carrying our common cause to the Nation is not alone yours and mine. It devolves with heavy hand upon each and every member of the Congress of the United States who believes in the restoration of the principle of exercise by the states of those rights reserved by them under the Constitution, and which have never been delegated, forfeited or surrender to the Federal Government.

It is not enough for gentlemen to cry unto you and me, "Don't give up the ship," "Stop them," "It must not happen," or—"It can be prevented." If any of them know the way through the dark maze of judicial aberration and constitutional exploitation, I call upon them to shed the light for which Virginia stands in dire need in this, her dark and agonizing hour. No fair-minded person would be so unreasonable as to seek to hold me responsible for failure to exercise powers which the state is powerless to bestow.

I trust that the bounds of propriety will permit what I believe to be a necessary but brief review of this long, hard struggle in defense of Virginia's rights and our efforts to save our public school system from that chaos, confusion and disruption which will preclude it from effectively

administering the processes of education for all of our children.

In one capacity or another, I have been actively and officially identified with this fight since 1953. At all times our defense was predicated on the Constitution of the United States and the unbroken line of established apposite precedents woven into the concept and fabric of the Constitution as an integral part of the supreme law of the land.

[*"Fury of Pressure"*]

I witnessed personally the fury of the pressures, political, ideological, sociological and otherwise, which beat down upon the Court. I saw the Court ignore the Constitution, cast aside all precedents, Federal and state, and judicially legislate the ideology of a foreign socialist into the Constitution, outside of the record, with no opportunity for a hearing or cross-examination.

I took part in the effort to impress upon the Court the certain ruin of public education which would inevitably follow in the wake of its decision. I have witnessed your great efforts consistent with Virginia's honor and within the framework of law, as you conceived it to be, to maintain Virginia's rights and save her public school system.

I have kept in close touch, and counseled and advised, with the present Attorney General as he has poured the brilliance of his genius, his courage, and his great resourcefulness as a lawyer into the defense of the enactments which you placed upon the statute books of Virginia. Battling with his back to the wall in court for as many as 90 days in the last year, no attorney general could have worked harder, nor done more than he has done to uphold and defend the laws of this state.

[*"Unwarranted Criticism"*]

I deem this statement pertinent and relevant to the occasion, in view of the unwarranted criticisms in recent days that all has not been done that could have been done in defense of the way of life we cherish.

Under the constitutional mandate that the Governor take care that the laws be faithfully executed, I have applied the laws of Virginia relating to this matter and the Attorney General has defended them to the last ounce of their vitality.

I report as a fact, and not in a spirit of criticism, that the laws enacted to prevent the mixing of the races in our public schools and to provide educational aid to those in areas where schools have been closed, have been stricken down by a Federal Court, and by the Supreme Court of Appeals of Virginia. The imminence of the peril to our people of the crisis thus engendered challenges the loyalty and dedication of our hearts and minds, and the prompt application of our talents and efforts, to the very best we can give in the service of Virginia.

There are those who insist that I invoke the police power of this State to prevent the opening of the closed schools on an integrated basis or to close them when opened on such a basis.

The General Assembly has pledged that it would resist unwarranted Federal encroachment with honor and within the framework of law. I have repeated that pledge to the people. It is as solemn and sacred now as when it was made.

The police power of this State cannot be invoked by the Governor, nor can the General Assembly validly instruct or direct him to use it on an arbitrary basis. The police power cannot be asserted to thwart or override the decree of a court of competent jurisdiction, State or Federal. If the necessity arises, I can and will invoke the police power to protect the safety and good order of the community, to restore order and protect life and property.

There are those who insist that I seek authority from the General Assembly to padlock and police any school threatened with the imminence of integration. The Assembly cannot confer such authority. I am willing to serve in durance vile with those who give the advice if it will accomplish the desired purpose. I know of nothing more futile than penal sentence that contributes to nothing but the ridiculous.

[*Not State Action*]

It has long been the law, and recently affirmed, that action under an unconstitutional statute is not action by the State protected by the immunity of the 11th Amendment to the United States Constitution.

It should be clearly understood that the Governor, the Attorney General, and any other officer of the State, is as amenable to suit as any other citizen when he seeks to perform an unlawful act, or to do an unconstitutional thing

under the guise and cloak that it is an act of the State and not of the individual.

Contrary to the opinion of some, I cannot conceive how the Pupil Placement Act can be asserted either as a buffer or bulwark between the overriding and superior power of the Federal Government and the operation of a segregated school. That which the State itself is powerless to do it cannot confer upon an administrative agency.

The State cannot confer upon any agency the authority to reexamine or readjust rights finally determined and adjudicated. In the cases already finally adjudicated, the pupils were before the court which determined their rights and in effect made the assignments. The Court cannot relieve itself of the onus of actually making the assignment through the expedient of coercing the school board.

The Pupil Placement Board is powerless to effectively reassign children from schools in which they have been placed by the Federal Court. As distasteful as it is, that fact must be faced as a reality.

It has been asserted in political debate and in the halls of this Assembly that the North Carolina and Alabama assignment plans form the basis of the solution of our problem. If intergration is the solution, then, like the school system of the District of Columbia, they are models.

[*Assignment Plan a "Conduit"*]

Any assignment plan administered in conformity with Federal edicts is a conduit through which to channel an ever-increasing stream of Negro children into white schools. No assignment plan, however devised or whatever the criteria, can be used to exclude a Negro child from a white school on the basis of race.

Such a plan places into the hands of the NAACP the power to measure the degree and the tempo of mixing of races in the public schools. With or without the formality of an assignment plan, local school boards possess the authority to apply any rational nondiscriminatory criteria relating to admission except that of race.

The assignment plan theory embraces the philosophy and concept of integration. Otherwise it would be proscribed both by the Federal courts and the NAACP.

Experience elsewhere has confirmed the conviction of our people that the enforced mixing of the races, contrary to the expressed will of the overwhelming majority will destroy public education in Virginia. In many of our political subdivisions, the people will not elect governing boards to tax them and appropriate funds for a system which they cannot use.

[*Differences in Degree*]

While there may be differences in the degrees of intensity of feeling in different areas, the fixed conviction pervades the entire State. The people are sincere and honest in their convictions. They realize that the ruthless hand of Federal power under the driving urge of a minority pressure group has deprived them of their voice in molding the character and in the education of their children.

They are rooted in the belief that the right to associate carries with it the right not to associate. They will not have their children subjected by the force of Federal power to that which they are convinced is inimical to their welfare, and which was thrust upon them without any regard for their rights.

No public school system can survive when isolated from the support of the people whose substance and devotion are its life's blood.

Those who have brought this calamity upon us and themselves were repeatedly warned. Armed with Federal decree and sanction, they have pushed their Pyrrhic victory to the brink of disaster.

The time has arrived to take a new, thorough, and long look at the situation which confronts us. Our children will be educated, and educated effectively. There is no longer any hope for many thousands of them to be educated in public schools. For these children whose welfare cannot be neglected, we must begin now to lay the groundwork for a transition to other methods as effective or better than those which have served until the hammer of Federal intervention fell with devastating force.

In the arguments before the Supreme Court of the United States, we were frequently reminded that we had a segregated system enforced by a compulsory attendance law. In 1956 we amended the statute to provide that "no child shall be required to enroll in or attend any school wherein both white and colored children are enrolled."

To leave the statute in its present form would render it amenable to attack and expose other

legislation to its alleged virus. I recommend the outright repeal of this statute.

It is imperative that you give immediate consideration to the matter of grants in aid to education.

I shall submit for your consideration an amendment to the 1958 appropriation act to provide for:

1. The payment of tuition grants, (a) to pupils in localities where there are inadequate public schools available; (b) to pupils whose welfare would be best served if they attended a school other than the public school which they would normally attend; and (c) to pupils whose parents, guardians or custodians object, upon grounds deemed valid and reasonable by the State Board of Education to their attendance at the public school to which they have been or would be assigned.

2. The restoration of the provisions and wordage of the items relating to public education found in the 1956 appropriation act, before any amendments were made thereto, together with those changes adopted by the 1958 session of the General Assembly which had no relation to the maintenance of the separation of the races in the public schools; and

3. To provide for the continued payment of the State's share of the salaries to teachers and other school employes where there has been a material loss in average daily attendance.

The financing of tuition grants by the State presents no problem for the payment of tuition grants for the biennium 1958-1960. An adequate appropriation can be made out of the general fund of the state treasury without substantial risk of creating a deficit for the current biennium; and I recommend that this appropriation be made immediately.

[*Unexpended Sums*]

At the end of each biennium there are always unexpended sums of appropriations of such nature that they revert to the general fund. The current biennium will be no exception. The total amount of these reversions varies from biennium to biennium. The average for the past five biennia has been approximately $7,560,000.

Although it is by no means clear that this average will be reached at the end of the current biennium, it is noted that projects in the capital outlay program let to contract during the biennium 1956-1958 and completed in the current biennium have required an expenditure of $1.5 million less than the appropriations therefor. This sum is now available for appropriation.

Moreover, an additional amount of $500,000 has been saved so far during the current fiscal year on capital projects let to contract at figures less than the appropriations therefor.

In addition to the above-described $2 million there is item 484 in the current general appropriations act "for meeting public school contingencies," a sum sufficient, estimated at $250,000, for the first year and $250,000 for the second year. No part of this appropriation has been spent, and the estimated $250,000 for each year can be included in an appropriation specifically for tuition grants.

These specific sums are exclusive of expected miscellaneous unexpended amounts at the end of the current biennium that would revert to the general fund, and based on past experience the total of these will be several million dollars.

I am also recommending an amendment to chapter 58 of the acts of assembly, special session of 1956, sections 22-115.10 through 22-115.19 of the Code of Virginia, relating to the payment of tuition grants by counties, cities, and towns to make the methods and conditions for the payment of tuition grants by the counties, cities and towns correspond to those contained in the recommended amendment to the appropriation act.

I desire to here state and re-emphasize a statement I made to the people of Virginia on Jan. 20, 1959.

[*No Legal Compulsion*]

No parent or guardian is under any legal compulsion from any source to send a child to a racially mixed school. In certain areas affected by adverse Federal decrees the people have responded magnificently to the emergency created through the closing of schools. Thousands of our children have adjusted to the situation.

The processes of education are being admirably and effectively administered. The hardships and sacrifices have constituted a challenge to overcome obstacles with the result that fundamentally sound educational progress is being made without chaos or undue confusion.

Amid the agony of these trying days I have been heartened and inspired by the profound spirit of dedication and determination of these citizens and their children as well as the teachers, who have comported themselves so as to

reflect immeasurable credit on the highest qualities of patriotic citizenship.

To prevent the pyramiding of chaos, confusion and disruption, I urgently request that private instruction now obtaining, and wherever it may become necessary, continue and go forward without interruption.

I urge the wholehearted cooperation of all concerned to this end. It is my firm belief that to break the chain of continuity in the administering of private instruction and the consequent confusion of a transition which may invoke conditions justifying its termination would be productive of incalculable harm.

I know you share my deep concern relative to violence or threats of violence designed to intimidate or to endanger the security of life, limb or property. Whatever may ensue as a result of this crisis, law and order must prevail to the end that the good name and honor of Virginia be not defamed.

With fairness and impartiality to all, I am determined to keep the peace and good order. This is a state function and responsibility. I know of nothing for which to thank the Federal Government during this struggle to preserve our rights except to keep out of our local problems which it has created.

[*Urges Stronger Laws*]

I recommend the strengthening of our laws relating to this subject.

I have previously stated my purpose to appoint a commission composed of members of the General Assembly. The delay has been occasioned by the urgency of the situation which has caused you to convene. It is utterly impossible for the assembly to give them consideration which the situation demands in the absence of the formulation of a thorough, carefully and legally devised program.

The various and difficult facets of such a program must be soundly coordinated and correlated. Virginia must elect to press defense of her rights and her cherished institutions on a plateau of her own choosing. With your cooperation I have promised that it can and will be done consistent with honor and within the framework of law that will withstand the attacks of those created by power and armed with the edicts of the Federal Judiciary.

Some of the matters that I would submit for consideration by the commission would relate, among other things, to the following:

1. Repeal of laws that have been finally adjudged to be unconstitutional or have proven ineffective. We must strengthen our position as we prepare for the future by removing from our statutes that which those who oppose our way of life have used as a virus to contaminate the whole.

2. It may be well in the light of unfolding revelations to take a more thorough look at the statutes of our compulsory attendance laws.

3. Procedures for valid bona fide sales of school properties where such properties become surplus by withdrawal of children therefrom.

4. Modification of statutes providing for liens on buildings and lands where literary fund loans obtain.

5. Complete study and revision of tuition grant statutes; whether they should be paid by the State, and what proportion, if any, should be shared by the localities.

6. Revision of laws relating to pupils transferring from schools of one political subdivision to another, and tuition payments under such circumstances.

7. A careful evaluation of the three-school system and pupil preference plan.

8. Revision of statutes relating to the transportation of children to schools.

9. A more thorough study relating to the teaching profession as to retirement, sick leave and tenure.

10. Careful study relating to the revision of our tax structure, the long range impact of tuition grants, and the imposition of a sales tax.

11. Careful study of an amendment to Section 129 of our Constitution.

It is obvious to me that a most deliberate and painstaking study must be given to such a program if we are to avert chaos in Virginia.

I most respectfully and earnestly recommend that the Assembly not undertake at this time to deal with the complexities involved in the formulation of the program outlined. I recommend that the Assembly promptly enact the emergency measures which I shall submit, and then stand in recess to receive further recommendations following the study and report by the commission. I shall urge the commission to act with that dispatch commensurate with the importance of the problems to confront it and the exigencies of the situation.

[*May Call Another Session*]

If for any reason the Assembly deems it impractical or inadvisable to follow this suggestion, I would be disposed to consider another call into extra session to receive further recommendations following the findings and report of the commission.

There is another matter to which it pains me to refer. Candor and justice compel the reference.

It has been charged that the call of this session was issued as a result of pressure from pro-segregationists; that I have surrendered the reins of the State Government, and that I had repeatedly stated that I would not issue the call until I had "an effective plan to meet the crisis which will face Virginia next week."

The facts are as follows: I issued this call under the force of the urgency of the crisis pyramided by recent judicial decisions. I have repeatedly stated that I did not possess the power and knew of none that could be evolved that would enable Virginia to overthrow or negate the over-riding power of the Federal Government.

I stated this to every member of the General Assembly with whom I had the honor to confer. I made the same statement to others vitally and deeply concerned. The call was in response to my own convictions as to the proper thing to do and on the recommendations of many whose views do not coincide on the issues involved. No one has taken over the executive branch of the State Government.

In this struggle Virginia has been subjected to pressures more relentless, brutish and formidable than that applied to any other state. She has preserved her system of public schools longer than any state where the issue has been pressed. She has not surrendered and she does not surrender now. Her fight to enjoy every right inherent in her sovereignty and reserved to her under the Constitution will continue with never diminishing faith and confidence in the righteousness of her cause and the hope of ultimate vindication.

[*Pledges Resistance*]

I pledged to the people of Virginia that I would resist with every resource at my command that which I know to be wrong and would destroy every rational semblance of effective public education in Virginia. I have kept that pledge and you have kept it. Only those Virginians whose hearts are not in the fray give up in adversity. To the strong, a battle lost is but a challenge to redouble effort, energy and devotion to scale the heights of worthy achievement.

No one could be more sensitive than I to the tensions of the moment. Only God knows the surge of emotion within me striving for mastery. Only my love for Virginia and the pillar of the Almighty sustain me in this hour.

How fortunate for Virginia that the highest attributes of gentlewomen and gentlemen pervade this Assembly. On great issues statesmen divide, but never allow the firmness of conviction or the heat of debate to do violence to the Commonwealth.

"These are the times that try men's souls. The summer soldier and the sunshine patriot will in this crisis shrink from the service of their country; but he that stands it now, deserves the love and thanks of man and woman. Tyranny, like hell, is not easily conquered. Yet, we have this consolation with us, that the harder the conflict, the more glorious the triumph." (Thomas Paine —1776).

EDUCATION
Compulsory Attendance—Virginia

Chapter 2 (House Bill No. 5) of the Acts of the 1959 Extra Session of the Virginia General Assembly, approved January 31, 1959, repeals compulsory school attendance statutes. [See also 1 Race Rel. L. Rep. 1096 (1956).]

AN ACT to repeal §§ 22-251 as amended, 22-252, 22-253, 22-253.1 as amended, 22-254 through 22-261, 22-262 as amended, and 22-263 through 22-275 of the Code of Virginia, and

Chapter 59 of the Acts of the Extra Session of 1956, codified as § 22-253.2, all relating to compulsory school attendance.

Be it enacted by the General Assembly of Virginia:

1. That §§ 22-251 as amended, 22-252, 22-253, 22-253.1 as amended, 22-254 through 22-261, 22-262 as amended, and 22-263 through 22-275 of the Code of Virginia, and Chapter 59 of the Acts of the Extra Session of 1956, codified as § 22-253.2, are repealed.

2. An emergency exists and this act is in force from its passage.

EDUCATION
Public School Funds—Virginia

The 1959 Extra Session of the Virginia General Assembly adopted on January 31, 1959, Appropriation Act Amendments: (1) authorizing the State Board of Education, with the governor's approval, to adjust the distribution of state funds for teachers' salaries as may be equitably necessary due to a substantial loss in average daily attendance in a given locality; (2) appropriating up to $3 million for the 1958-59 and 1959-60 school sessions to pay pupil tuition grants, not to exceed in individual cases the actual cost of the pupil's attendance or $250 per session, whichever sum is lesser. [See also 4 Race Rel. L. Rep. 191, 192 (1959).]

Item 138:

(*teachers' salaries*)

i. It is further provided that the State Board of Education with the approval of the Governor may make such equitable adjustment in the distribution of this fund as may be necessary due to a substantial loss in average daily attendance of pupils in any county, city or town. The average daily attendance data for such county, city or town for the previous year may be used in making this adjustment.

Item 158-A

To further and encourage generally the education of the children in Virginia, by providing for the payment of tuition grants for children attending nonsectarian private schools and public schools located in school districts other than that which the children would normally attend, a sum sufficient, estimated at First Year, $1,200,000; Second Year, $1,800,000.

a. The sums appropriated by this item shall be expended to provide tuition grants to pupils attending those said schools which are approved for their attendance by the State Board of Education, and shall be made under rules and regulations to be promulgated and enforced by the State Board of Education. Such grants shall be paid out of this appropriation to the parent, guardian or other custodian of the pupil, and shall not exceed $250.00 for the school session 1958-59 and $250.00 for the school session 1959-60, or the amount necessary to be expended in payment of the actual cost of such pupil's attendance at said school, whichever sum is the lesser.

b. Pupils entitled to tuition grants hereunder shall be those whose parents, guardians or custodians make affidavit, and establish to the satisfaction of the State Board of Education, that there is no adequate public school available for the pupil to attend, or that the welfare of the child would be best served if he attended a school other than the public school which he would normally attend; or that the pupil, his parents, guardian or custodian object upon grounds deemed valid and reasonable by the State Board of Education to such pupil's attendance at the public school to which he has been or would normally be assigned. Nothing herein contained shall be construed as prohibiting localities from supplementing such grants from local funds otherwise legally available.

EDUCATION
School Bombing—Virginia

Chapter 4 (House Bill No. 3) of the Acts of the 1959 Extra Session of the Virginia General Assembly, approved February 3, 1959, makes unlawful the threat to bomb or otherwise damage any school buildings and other structures and means of public transportation, the communication of false information as to the existence of any peril of bombing or damage to such objects, and causing or soliciting the communication of such threats or false information.

AN ACT to amend the Code of Virginia by adding in Title 18 thereof new sections numbered 18-151.1, 18-151.2, 18-151.3, 18-151.4, and 18-151.5, to make unlawful a threat to bomb, burn, destroy or in any manner damage buildings, structures, dwelling houses, or means of public transportation; to make unlawful the communication of false information as to the existence of any peril of bombing burning, destruction or damage to such buildings, structures, dwelling houses or means of transportation; to make it unlawful to cause, encourage, incite, entice or solicit any person to communicate any such threat or false information, and to provide penalties for violations.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia be amended by adding in Title 18 thereof new sections numbered 18-151.1, 18-151.2, 18-151.3, 18-151.4 and 18-151.5 to read as follows:

§ 18-151.1. Any person fourteen years of age or over who makes and communicates to another, whether by writing, telephone, telegraph or other means, any threat to bomb, burn, destroy or in any manner damage any school building, church, meeting house, store building, factory, place of assembly, or any building, structure, or dwelling house, or aircraft, motor vehicle, or other means of public transportation, shall be guilty of a felony and upon conviction shall be punished by confinement in the penitentiary not less than one nor more than ten years or in the discretion of the court or jury trying the case be confined in jail not exceeding twelve months and fined not exceeding five hundred dollars.

§ 18-151.2. Any person under the age of fourteen years who makes and communicates to another, whether by writing, telephone, telegraph, or other means, any threat to bomb, burn, destroy or in any manner damage any school building, church, meeting house, store building, factory, place of assembly, or any building, structure, or dwelling house, or aircraft, motor vehicle or other means of public transportation, shall be guilty of a misdemeanor.

§ 18-151.3. Any person fourteen years of age or over who communicates to another, whether by writing, telephone, telegraph or other means, information, knowing the same to be false, as to the existence of any peril of bombing, burning, destruction or damage to any school building, church, meeting house, store building, factory, place of assembly, or any building, structure, or dwelling house, or aircraft, motor vehicle, or other means of public transportation, shall be guilty of a felony and upon conviction shall be punished by confinement in the penitentiary not less than one nor more than ten years or in the discretion of the court or jury trying the case be confined in jail not exceeding twelve months and fined not exceeding five hundred dollars.

§ 18-151.4. Any person under the age of fourteen years who communicates to another, whether by writing, telephone, telegraph, or other means, information knowing the same to be false, as to the existence of any peril of bombing, burning, destruction or damage to any school building, church, meeting house, store building, factory, place of assembly, or any building, structure, or dwelling house, or aircraft, motor vehicle, or other means of public transportation, shall be guilty of a misdemeanor.

§ 18.151.5. Any person fourteen years of age or over, including the parent of any child, who shall cause, encourage, incite, entice or solicit any person, including a child, to commit any act prescribed by the provisions of §§ 18-151.1, 18-151.2, 18-151.3 or 18-151.4, shall be guilty of a felony and upon conviction shall be punished by confinement in the penitentiary not less than one nor more than ten years or, in the discretion of the court or jury trying the case be confirmed in

jail not exceeding twelve months and fined not exceeding five hundred dollars.

2. An emergency exists and this act is in force from its passage.

EDUCATION
Tuition Grants—Virginia

Chapter 1 (House Bill No. 2) of the Acts of the 1959 Extra Session of the Virginia General Assembly, approved January 31, 1959, amends and re-enacts tuition grant legislation adopted by the 1956 Assembly, Extra Session [1 Race Rel. L. Rep. 1091-1096, 1097, 1101, 1111 (1956)] by providing for the availability of grants for children in public schools outside of the locality making a grant, as well as in nonsectarian private schools, where there is no adequate public school available, where the welfare of a child would be best served if he attended a school other than the public school he would normally attend, or where a child's parents or guardians object, on grounds deemed valid and reasonable by the local school board, to his attendance at the public school to which he has been assigned or would normally be assigned. The act also redefines the methods by which the state is to be reimbursed for grants made on behalf of local governments and repeals provisions for the effect of payment of grants upon the distribution of state school funds to localities. [See also 3 Race Rel. L. Rep. 1241 (1958); 4 Race Rel. L. Rep. 189, 192 (1959).]

An Act to amend and reenact §§ 22-115.10, 22-115.12, 22-115.13 and 22-115.19 of the Code of Virginia, which were codified from Chapter 58, Acts of the General Assembly of 1956, Extra Session, relating to the payment of tuition grants by counties, cities, and towns, for the furtherance of elementary and secondary education so as to provide that funds shall be provided for such grants, for the education of children in public schools located outside of the county, city or town making such grant, as well as in nonsectarian private schools; to redefine the persons entitled to and the conditions under which such grants shall be paid; and to redefine the method by which the State shall be reimbursed for grants made on behalf of the county, city and town; and to repeal § 22-115.15 of the Code of Virginia which was likewise so codified from said chapter and which provides for the effect of the payment of tuition grants upon the distribution of State school funds to the localities.

Be it enacted by the General Assembly of Virginia:

1. That §§ 22-115.10, 22-115.12, 22-115.13 and 22-115.19 of the Code of Virginia be amended and reenacted as follows:

§ 22-115.10.—The division superintendent of schools of every county, city, or town if the same be a separate school district approved for operation, * shall, * *in addition* to his estimate of the school budget required of law, *submit an estimate* of the amount of money needed for the payment of grants for the furtherance of the elementary or secondary education, as the case may be, of the children of such county, city or town, in nonsectarian private schools, *and in public schools of other localities and for transportation of children to such schools as provided by § 22-115.14.*

§ 22-115.12.—The educational funds so raised and other available funds shall be expended by the local school board in payment of grants for the furtherance of the elementary or secondary education, as the case may be, of the children of such county, city or town in nonsectarian private schools * *and in public schools of other localities; such payments shall be made to parents, guardians, or other custodians of children whose parents, guardians, or custodians make affidavit, and establish to the satisfaction of the local school board, that there is no adequate public school available for the child to attend, or that the welfare of the child would be best served if he attended a school other than the public school at which he would normally attend, or that the child, his parents, guardian or custodian object upon grounds deemed valid and reasonable by the local school board, to such*

child's attendance at the public school to which he has been or would normally be assigned.

§ 22-115.13.—The total amount of each such grant shall be the amount necessary to be expended by the parent, guardian or * *custodian* of the child, in payment of the cost of his attendance at a nonsectarian private school, *or in a public school of another locality,* for the current school year; provided, however, that such annual grant, together with any tuition grant received from the State, shall not exceed the total cost of operation per pupil in average daily attendance in the public schools for the locality making such grant as determined for the preceding school year by the Superintendent of Public Instruction.

§ 22-115.19.—For so long as * *the county, city or town fails or refuses to make grants under the provisions of § 22-115.12 to those entitled thereto for any school term or session commencing subsequent to June thirty, nineteen hundred fifty-nine,* the State Board of Education shall authorize and direct the Superintendent of Public Instruction, under rules and regulations of the State Board of Education, to provide for the payment of grants on behalf of such county, city or town *. In such event the Superintendent of Public Instruction shall at the end of each month file with the State Comptroller and with the school board and the governing body of such county, city or town a statement showing all disbursements and expenditures so made for and on behalf of such county, city or town, and the Comptroller shall from time to time as such funds become available deduct from other State funds appropriated by the State, * for distribution to such county, city or town, such amount or amounts as shall be required to reimburse the State for expenditures incurred under the provisions of this article; * provided, that in no event shall any funds to which such county, city or town may be entitled under the provisions of Title 63 of the Code *or for the operation of public schools* be withheld from such county, city or town under the provisions of this article.

2. § 22-115.15 of the Code of Virginia is repealed.

3. An emergency exists and this act is in force from its passage.

EDUCATION
Tuition Grants—Virginia

Chapter 6 (House Bill No. 8) of the Acts of the 1959 Extra Session of the Virginia General Assembly, approved February 3, 1959, makes it unlawful for one to obtain or expend (or seek to do so) any educational tuition grant for any purpose other than the education of the child for whom it was sought or obtained. [See also 4 Race Rel. L. Rep. 189, 191 (1959).]

AN ACT to make it unlawful for any person to obtain, seek to obtain, expend, or seek to expend, any educational tuition grant for any purpose other than the education of the child for which such grant is sought or obtained, and to provide the punishment therefor.

Be it enacted by the General Assembly of Virginia:

1. It shall be unlawful for any person to obtain, seek to obtain, expend, or seek to expend, any educational tuition grant for any purpose other than the education of the child for which such grant is sought or obtained. Violation hereof shall, except for offenses punishable under § 18-237 of the Code of Virginia, constitute a misdemeanor and shall be punishable as provided by law.

2. An emergency exists and this act is in force from its passage.

The 1957 legislature enacted two significant pieces of legislation: (a) A fair employment practices law,[1] and, (b) an amendment to the 1895 public accommodations law.[2] Both laws are aimed at preventing and eliminating discrimination because of race, creed, color, national origin or ancestry. Both laws authorize the Commission to make studies as to the existence, causes, character and extent of discrimina-

tion and to publish its findings. Both laws emphasize education as a means to that end. In addition to making studies and conducting educational activities, the Commission is empowered to receive, investigate and pass upon complaints alleging discriminatory or unfair employment practices as defined in each of the two laws. This report covers the first full year's administration of the two laws.

Although the two laws are effective as presently written, experience indicates that some amending would be desirable. For example, the publication of terms of settlement of complaints should be permitted; and, the public accommodations law should be rewritten to more clearly establish the Commission's jurisdiction. Therefore, the Commission recommends that the Governor and the 42nd General Assembly confer with the Commission on this matter and make the necessary changes. The Commission also urges the Governor and the 42nd General Assembly to carefully consider the enactment of open occupancy housing legislation. The two laws now in effect plus a housing law would give to Colorado a well-rounded set of laws with which to combat racial and religious discrimination.

* * *

CONSTITUTIONAL LAW
Commission on Constitutional Government—Georgia

Act No. 2 (H.B. 4) of the 1959 Session of the Georgia General Assembly, approved by the governor on February 3, 1959, creates the Governor's Commission on Constitutional Government, empowered to formulate legislation and recommend courses of action to provide for a clearer delineation of federal-state relationships. (The legislative history of the Act indicates that the new commission is intended as a replacement for the former Georgia Commission on Education; for a discussion of the powers of the latter organization, see 2 Race Rel. L. Rep. 1049.)

AN ACT to create a Commission known as the GOVERNOR'S COMMISSION ON CONSTITUTIONAL GOVERNMENT, to provide its powers and duties, to provide funds for its operation, to repeal conflicting laws, and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. There is hereby created a Commission to be known as "THE GOVERNOR'S COMMISSION ON CONSTITUTIONAL GOVERNMENT."

Section 2. The Commission shall formulate plans of legislation, prepare drafts of suggested laws, and recommend courses of action for consideration by the General Assembly of Georgia and the legislative bodies of other states and the Congress of the United States to provide for the clear delineation between the general sovereignty of the states and the limited sovereignty of the Federal Government, as historically provided for in the Constitution of the United States and the Constitution of the State of Georgia, and to provide for the prevention of encroachment by the Federal Government on the functions, powers, and rights of the State of Georgia and other states of the United States.

Section 3. The Commission shall be composed of the Governor, Lieutenant Governor, Speaker of the House of Representatives, the Attorney General, Chairman of the Judicial Council, President of the Georgia Bar Association, and 15 other citizens to be appointed by the Governor, representative of the State both geographically and in all segments of her economy.

Section 4. The Governor shall be chairman of said Commission. Said Commission shall perfect its organization conformable to the provisions of this Act and may appoint subcommittees.

Section 5. The Commission is authorized to cause its findings, proposed plan or plans of

legislation, accompanying drafts of suggested laws, or other courses of action, and its comments thereon, to be printed and distributed to the members of the General Assembly of Georgia, or the legislative body of other states, or to the Congress of the United States, or to the public, when in their discretion it is deemed appropriate.

Section 6. The Chairman is authorized to assign quarters and to employ such help, technical assistants, and legal counsel, to aid the Commission in the performance of its duties as he may deem proper, and to fix their compensation. The funds for the operation of the Commission shall be made available by the Bureau of the Budget from funds appropriated for the operation of the Executive Department.

Section 7. All laws, or parts of laws, in conflict with the provisions of this Act are hereby repealed.

LITIGATION
Employment of Counsel—Georgia

Act No. 9 (S.B. 4) of the 1959 Session of the Georgia General Assembly, approved by the governor February 3, 1959, permits the state to employ and pay counsel in suits filed against public officials in connection with the administration of their duties.

AN ACT to provide for the conduct of certain actions; to provide for the designation of counsel in certain action; to provide for notification of the pendency of such actions; to provide for the payment of expenses; and for other purposes.

Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same:

Section 1. When any action is filed in any court of this State, or in any Federal Court, against a public officer, public official, board or bureau, or any of its members, created, by the laws of this State, which seeks relief, legal or equitable, against such public officer, public official, board or bureau, or any of its members, in the administration of his or its duties, and where the State, through any of its agencies, appropriates or allocates moneys to such public official (or their offices), board or bureau which is used in the administration of his or its functions, and this shall include County Registrars, and where no regular counsel is provided for such public officer, public official, board or bureau, including County Registrars, by the Attorney General of this State, the Governor of the State shall be immediately notified by such public officer, public official, board or bureau, including County Registrars, or its member or members, and he may designate legal counsel in such case for such public officer, public official, board or bureau, or its members.

Section 2. Whenever, in any such action as specified in Section 1 of this Act, the Governor shall designate counsel as therein provided, any fees or expenses paid to or on account of such counsel and such court costs as are incurred shall be paid by the state.

Section 3. The provisions of this Act shall be applicable to pending suits and the provisions hereof shall be complied with within ten days following approval of this Act.

Section 4. In the event any portion, or portions, of this Act shall be held unconstitutional for any reason, the remaining portion, or portions, shall remain in full force and effect.

Section 5. All laws and parts of laws in conflict with this Act are hereby repealed.

HOUSING
Private Housing—Pennsylvania

The City Council of Pittsburgh, Pennsylvania, has approved an ordinance prohibiting discrimination in the sale, rental, and financing of private housing. The ordinance, approved December 8, 1958, supplements an earlier ordinance prohibiting discrimination in employment. 1 Race Rel. L. Rep. 746 (1956).

AN ORDINANCE enacted into law by the Council of the City of Pittsburgh on December 8, 1958:

Supplementing Ordinance No. 237, entitled "An Ordinance—Establishing procedures for the elimination of discrimination in the social, cultural and economic life of the City; requiring fair employment practices by prohibiting discrimination in employment because of race, color, religion, ancestry, national origin or place of birth by employers, employment agencies, labor organizations and others; establishing a Commission on Human Relations in the Office of the Mayor and prescribing the powers and duties thereof, including the powers and duties heretofore performed by the Division of Civil Unity, the Civil Unity Council and the Fair Employment Practices Commission; and providing penalties", approved, June 25, 1955, by prohibiting discrimination in housing and in the financing of housing in the City of Pittsburgh because of race, color, religion, ancestry or national origin by any person, including real estate brokers, real estate salesmen and agents, owners of real property, and lending institutions.

The Council of the City of Pittsburgh hereby enacts as follows:

Section 1. Findings of Fact.

(a) That the population of the City of Pittsburgh consists of people of every race, color, religion, ancestry and national origin, many of whom are compelled to live in circumscribed and segregated areas, under substandard, unhealthful, unsafe, unsanitary and overcrowded living conditions because, of discrimination in the sale, lease, rental, and financing of housing.

(b) That these conditions have caused increased mortality, disease, crime, vice and juvenile delinquency, fires and risk of fire, intergroup tensions and other evils, thereby resulting in great injury to the public safety, public health and general welfare of the City of Pittsburgh, and reducing its productive capacity;

(c) That the harmful effects produced by discrimination in housing also increase the cost of government and reduce the public revenues thus imposing financial burdens upon the public for the relief and amelioration of the conditions so created;

(d) That discrimination in housing results in other forms of discrimination and segregation, including racial segregation in the public schools and other public facilities, which are prohibited by the Constitution of the United States of America, and are against the laws and policy of the Commonwealth of Pennsylvania and the City of Pittsburgh;

(e) That discrimination in housing adversely affects the continued redevelopment, renewal, growth and progress of the City of Pittsburgh.

Section 2. Declaration of Policy.

It is hereby declared to be the policy of the City of Pittsburgh, in the exercise of its police power for the protection of the public safety, public health and general welfare, for the maintenance of business and good government and for the promotion of the City's trade, commerce and manufacturers, to assure equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry or national origin, and to that end to prohibit discrimination in housing by any person, including real estate brokers, real estate salesmen and agents, owners of real property and lending institutions.

Section 3. Definitions.

As used in this ordinance, unless a different meaning clearly appears from the context, the

following terms shall have the meanings ascribed in this section:

(a) *Commission.* The term "Commission means the Commission on Human Relations established in the Office of the Mayor pursuant to Ordinance No. 237, approved June 25, 1955.

(b) *Discriminate* or *Discrimination.* The terms "discriminate" or "discrimination" include any difference in treatment in the sale, lease, rental or financing of housing units or housing accommodations because of race, color, religion, ancestry or national origin.

(c) *Housing Accommodation.* The term "housing accommodation" means (1) a building or dwelling, or a number of buildings or dwellings, whether or not contiguous, in the City of Pittsburgh, comprising or containing five or more housing units, owned or otherwise subject to the control of one owner, or (2) any parcel or parcels of real property or lot or lots, whether or not contiguous, in the City of Pittsburgh, available for the building of five or more housing units, owned or otherwise subject to the control of one owner.

(d) *Housing Unit.* The term "housing unit" means (1) a single room or suite of rooms, or an apartment or a dwelling, occupied or intended for occupancy as separate living quarters, by an individual, by a family or by a group of individuals living together, or (2) a parcel of real property or a lot available for the construction of a housing unit.

(e) *Lending Institution.* The term "lending institution" means any person, as defined in this ordinance, regularly engaged in the business of lending money or guaranteeing loans.

(f) *Owner.* The term "owner" includes the lessee, sublessee, assignee, managing agent or other person having the right of ownership or possession, or the right to sell, rent or lease, any housing unit which is part of housing accommodation.

(g) *Person.* The term "person" includes an association, partnership or corporation, as well as a natural person. The term "person" as applied to partnerships or other associations includes their members, and as applied to corporations includes their officers.

(h) *Real Estate Broker.* The term "real estate broker" means any natural person, partnership, association or corporation, who for a fee or other valuable consideration, sells, purchases, exchanges or rents, or negotiates, or offers or attempts to negotiate, the sale, purchase, exchange or rental of the real property of another, or holds himself out as engaged in the business of selling, purchasing, exchanging or renting the real property of another, or collects rental for the use of the real property of another.

(i) *Real Estate Salesman or Agent.* The term "real estate salesman or agent" means any person employed by a real estate broker to perform, or to assist in the performance of, any or all of the functions of a real estate broker.

Section 4. Scope of Ordinance.

This ordinance applies to discriminatory housing practices within the territorial limits of the City, and to housing units and housing accommodations located within the territorial limits of the City.

Section 5. Exemptions.

Nothing in this, ordinance shall bar any religious or denominational institution or organization, or any charitable or educational organization which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination, or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

Section 6. Prohibited Acts.

It shall be an unlawful housing practice

(a) For any real estate broker or real estate salesman or agent to refuse to sell, lease, sublease, rent, assign or otherwise transfer, or to refuse to negotiate for the sale, lease, sublease, rental, assignment or other transfer, of the title, leasehold or other interest in any housing unit to any person, or to

represent that a housing unit is not available for inspection, sale, lease, sublease, rental, assignment or other transfer when in fact it is so available, or otherwise to deny or withhold any housing unit from any person because of race, color, religion, ancestry or national origin;

(b) For any owner to refuse to sell, lease, sublease, rent, assign or otherwise transfer the title, leasehold or other interest in any housing unit, which is part of a housing accommodation, to any person, or otherwise to deny or withhold such housing unit from any person because of race, color, religion, ancestry or national origin;

(c) For any real estate broker or real estate salesman or agent to include in the terms, conditions or privileges of any sale, lease, sublease, rental, assignment or other transfer of any housing unit any clause, condition or restriction discriminating against any person in the use or occupancy of such housing unit because of race, color, religion, ancestry or national origin;

(d) For any owner to include in the terms, conditions or privileges of the sale, lease, sublease, rental, assignment or other transfer of a housing unit, which is part of a housing accommodation, any clause, condition or restriction discriminating against any person in the use of occupancy of such housing unit because of race, color, religion, ancestry or national origin;

(e) For any real estate broker or real estate salesman or agent to discriminate in the furnishing of any facilities or services for any housing unit because of race, color, religion, ancestry or national origin;

(f) For any owner to discriminate in the furnishing of any facilities or services for a housing unit, which a part of a housing accommodation, because of race, color, religion, ancestry or national origin;

(g) For any lending institution to discriminate in lending money, guaranteeing loans, accepting mortgages or otherwise making available funds for the purchase, acquisition, construction, rehabilitation, repair or maintenance of any housing unit or housing accommodation, because of race, color, religion, ancestry or national origin;

(h) For any real estate broker, real estate salesman or agent, owner, or any other person, or any lending institution, to publish or circulate, or to cause to be published or circulated, any notice, statement or advertisement, or to announce a policy, or to use any form of application for the purchase, lease, rental or financing of housing, or to make any record or inquiry in connection with the prospective purchase, rental or lease of housing, which expresses directly or indirectly any limitation, specification or discrimination as to race, color, religion, ancestry or national origin, or any intent to make any such limitation, specification or discrimination;

(i) For any person, whether or not a real estate broker, real estate salesman or agent, owner, or lending institution, to aid, incite, compel, coerce, or participate in the doing of any act declared to be an unlawful housing practice under this ordinance, or to obstruct or prevent enforcement or compliance with the provisions of this ordinance or any rule, regulation or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful housing practice.

Section 7. Duties of the Commission on Human Relations.

It shall be the duty of the Commission to

(a) Initiate or receive and investigate complaints charging unlawful housing practices;

(b) Seek conciliation of such complaints, hold hearings, make findings of fact, issue orders and publish its findings of fact and orders in accordance with the provisions of this ordinance and with the ordinance establishing the Commission.

(c) Render from time to time, but not less than once a year, a written report of its activities and recommendations with respect to fair housing practices to the Mayor and to City Council; and

(d) Adopt such rules and regulations as may be necessary to carry out the purposes and provisions of this ordinance.

Section 8. Enforcement Procedure.

(a) A complaint charging a violation of this ordinance may be made by the Commission itself, by an aggrieved individual, or by an organization which has as one of its purposes the combating of discrimination or the promotion of equal housing opportunities.

(b) The Commission shall make a prompt and full investigation of each complaint of an unlawful housing practice.

(c) If the Commission determines after investigation that probable cause exists for the allegations made in the complaint, it shall attempt to eliminate the unlawful housing practice by means of conciliation and persuasion. The Commission shall not make public the details of any conciliation proceedings, but it may publish the terms of conciliation when a complaint has been satisfactorily adjusted.

(d) In any case of failure to eliminate the unlawful housing practice charged in the complaint by means of conciliation or persuasion, the Commission shall hold a public hearing to determine whether or not an unlawful housing practice has been committed. The Commission shall serve upon the person charged with having engaged or engaging in the unlawful housing practice, hereinafter referred to as respondent, a statement of the charges made in the complaint and a notice of the time and place of the hearing. The hearing shall be held not less than ten (10) days after the service of the statement of charges. The respondent shall have the right to file an answer to the statement of charges, to appear at the hearing in person or to be represented by an attorney or any other person, and to examine and cross-examine witnesses.

(e) If upon all the evidence presented, the Commission finds that the respondent has not engaged or is not engaging in any unlawful housing practice, it shall state its findings of fact and dismiss the complaint. If upon all the evidence presented the Commission finds that the respondent has engaged or is engaging in an unlawful housing practice, it shall state its findings of fact and shall issue such orders as the facts warrant.

(f) In the event the respondent fails to comply with any order issued by the Commission, it shall certify the case and the entire record of its proceedings to the City Solicitor for appropriate action to secure enforcement of the Commission's order.

Section 9. Penalties.

Any person who violates any of the provisions of this ordinance or any rule or regulation adopted by the Commission or who fails to comply with any order of the Commission, shall be subject to a fine not exceeding One Hundred and 00/100 Dollars and costs, and in default of payment of the fine and costs shall be subject to imprisonment for a period not exceeding thirty (30) days.

Section 10. Severability.

The provisions of this ordinance are severable and if any provision, sentence, clause, section or part thereof is held illegal, invalid or unconstitutional or inapplicable to any person or circumstance, such illegality, invalidity, unconstitutionality or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of the ordinance or their application to other persons and circumstances. It is hereby declared to be the legislative intent that this ordinance would have been adopted if such illegal, invalid or unconstitutional provision, sentence, clause, section or part had not been included therein, and if the person or circumstances to which the ordinance or any part thereof is inapplicable had been specifically exempted therefrom.

Section 11. Effective Date.

The effective date of this ordinance is June 1, 1959.

Section 12. Repeal.

That any ordinance or part of ordinance conflicting with the provisions of this ordinance, be and the same is hereby repealed so far as the same affects this ordinance.

ADMINISTRATIVE AGENCIES

EDUCATION
Public Schools—Virginia

The Secretary of the United States Department of Health, Education and Welfare, on January 26, 1959, issued a statement at a news conference that the Navy Department planned to apply for funds to conduct school on its Norfolk, Virginia, base, unless Norfolk public schools were re-opened shortly. He also stated that legislation was being drafted to provide education for children of military personnel who live off, as well as for those who live on, military bases, when the schools usually patronized by them are closed. [See 4 Race Rel. L. Rep. 5 (1959).] The Secretary's statement follows:

The President, at his press conference last week stated that the Department of the Navy and this Department were trying to work out a solution to the problem that confronts military personnel who are stationed in areas where schools have been closed.

Here are the developments to date:

1. We have been advised by the Navy Department that if the Norfolk, Virginia, schools are not opened shortly, the Navy Department intends to make application for funds to conduct school on the base for children of parents who live on the base.

2. We have stated that if the children of military personnel attend other public schools than those in Norfolk, those schools will receive financial assistance for these children under the provisions of the federally impacted area law (P.L. 874) if the schools meet the eligibility requirements. A school district is not entitled to assistance unless 3 percent of its average daily attendance is made up of children whose parents either reside on or are employed on Federal property.

3. We are working on the drafting of legislation that would enable us to provide education for children of military personnel who live off military bases as well as for those who live on military bases, when the schools these children usually attend have been closed. At the present time the law permits us to provide education only for those children who live on Federal property.

It is clear that when the Government orders military personnel to perform duties in a community, it has an obligation to do everything possible to see to it that their children are provided with adequate educational opportunities.

Civilian employees of the Federal Government who are working in communities where schools are closed are likewise confronted with an intolerable situation as far as providing their children with an education is concerned. These employees are not, of course, under military orders to remain in these communities, and the Federal Government, therefore, does not have the same relationship to them as it does to military personnel. These civilian employees are placed, however, in the difficult position of having to consider the possibility of moving unless the schools are opened. This, in turn, raises the question of the ability of the Federal Government to retain and to recruit qualified personnel who are willing to carry on its work in these communities.

Of the four communities in which schools are closed because of the desegregation issue, Norfolk presents the most acute problem to the Government in terms of numbers of students. Of the approximately 16,000 elementary and high school students who are dependents of Federal personnel, both civilian and military, in

Norfolk, about 5,500 are children of military personnel; of these 5,500, about 500 live on Federal property and about 5,000 reside in the Norfolk community off Federal property.

In Little Rock, Arkansas, there are approximately 300 children of military personnel, practically all of whom live off Federal property.

While there may be some military personnel in both Charlottesville and Warren County, Virginia, whose children are being denied education because of the closed schools there, we do not know how many such children there may be. Our figures on the number of children of military personnel are derived from the applications of the school districts for assistance under the federally impacted area laws. Since Charlottesville and Warren County have not applied for such assistance, it is assumed they do not meet the eligibility requirements and we do not know, therefore, the number of children of military personnel, if any, attending school in these communities.

ELECTIONS
Registration—Civil Rights Act

In October, 1958, the United States Commission on Civil Rights announced that it had received complaints alleging the denial of voting rights which it was required to investigate by the Civil Rights Act of 1957. (2 Race Rel. L. Rep. 1011). A hearing was scheduled at Montgomery, Alabama, on December 8, 1958. At that time, a number of developments occurred which are set out chronologically below. (For subsequent court proceedings see, 4 Race Rel. L. Rep. 97, supra.)

Opening Statements by Chairman, Vice-Chairman

As the hearings began, the Chairman, Dr. John A. Hannah, stated the Commission's reasons for conducting the hearing, and outlined its scope:

The Commission on Civil Rights was established under the Civil Rights Act of 1957. Under the Act, the Commission is required to "investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin. . . ." In order to carry out that explicit duty, the Commission is authorized to "hold such hearings . . . as the Commission may deem advisable."

The Civil Rights Act of 1957 is mandatory in providing that the Commission *shall* investigate voting complaints. Numerous complaints having been received by the Commission from certain parts of the State of Alabama, a preliminary investigation of those complaints was authorized and the results of the investigation were brought to the attention of the Commission at its recent meetings. After careful consideration of the information before it, the Commission unanimously agreed that a hearing should be scheduled for the purpose of gathering all of the facts about the voting situation in certain counties of Alabama.

I would like to emphasize that the Commission on Civil Rights is an independent agency of the government in no manner connected, even administratively, with the Department of Justice or with any other enforcement agency. The Commission is a fact-finding body which has the duty to determine what the facts are about voting in the United States and to report those facts to the President and to the Congress on or before September 9, 1959. Prosecutions, indictments—indeed, matters of *law enforcement* in any form whatsoever—are beyond the power of this Commission.

The emphasis of the Commission and its staff is on objectivity, and, as the Commission views

it, objectivity presupposes getting *all* of the facts. The Commission does not consider itself a protagonist for one view or another.

In that connection, I would point out that of the six members of the Commission, three are from the South and three are from the North. Politically, the Commission is composed of three Democrats, two Republicans, and one Independent. The Commission was established in the hope that through a dispassionate evaluation and appraisal of the facts some sort of reason and light could be brought to bear upon problems of national importance which have up to now been frequently and passionately debated but seldom soberly assessed.

The Commission is keenly aware of the forward strides that have been taken throughout the South in recent years in admitting Negroes to the exercise of the voting franchise. Not too many years ago in many parts of the South only white citizens were permitted to vote. I am told that now almost a million and a quarter Negroes are registered to vote throughout the South. That indicates that progress is being made in that direction.

This hearing is a serious attempt to determine what the facts are about voting in Alabama. The location of this hearing was not selected because of any predisposition on the part of the Commission to single out the State of Alabama for criticism or censure. It was selected because the Act under which we operate required that we investigate valid voting complaints, and the largest number of complaints came from Alabama. It is not unlikely that the information we derive from this hearing will be useful in the event future hearings are conducted elsewhere.

I am asking our Vice Chairman, who is a distinguished attorney, former President of the American Bar Association, and the Dean of the Law School of Southern Methodist University in Dallas, Texas, to preside at this hearing. Three other members of this Commission are distinguished attorneys—John S. Battle, formerly Governor of Virginia; Doyle E. Carlton, formerly Governor of Florida; and J. Ernest Wilkins of Chicago, formerly Assistant Secretary of Labor. Father Hesburgh, the President of the University of Notre Dame, and I have decided that we may participate in the questioning of witnesses from time to time—but in general we will rely upon the lawyer members of the Commission to bring out the facts.

Vice Chairman Storey, in accordance with the unanimous desires of the Commission, will you please take over and conduct this hearing.

Statement by Vice-Chairman

Subsequently, the Vice-Chairman of the Commission, Robert G. Storey, outlined his position in the hearings, stated the rules to be followed, and began the hearings:

First, may I add a word to the Chairman's statement assuring everyone that we are here on a mission to ascertain facts about an issue that is vital to every American citizen. We are here performing a duty that is for some of us unusual, a duty delegated to us by the Congress and the President. We did not seek this responsibility, but when the President appointed us to join in a non-partisan mission to seek the facts of this complex human and legal problem commonly known as civil rights, we felt obligated to serve.

This is a difficult assignment, at least for me, because it is raising fundamental questions about the political processes of my own region. My father was born and educated in Alabama. I have close relatives and good friends in this State. My grandfathers were Confederate soldiers, so there are many thoughts and memories going through my mind as we meet in Montgomery, the cradle of the Confederacy. But history moves on, we are one nation now. Hence, this bi-partisan Commission composed of two Presidents of great universities and four lawyers have a solemn duty to perform. We are sworn to uphold the Constitution of the United States.

Our sole purpose is to find the facts. We hope that a thorough understanding and evaluation of the facts will contribute to sound recommendations. As the President said when the Commission was created, these problems of civil rights can only be solved "by understanding and reason." Similarly, the Democratic Leader of the Senate, Senator Lyndon Johnson of my State, commented that this Commission "can be a useful instrument. It can gather facts instead of charges; it can sift out the truth from the fancies;

and it can return the recommendations which will be of assistance to reasonable men." It is in this spirit that we are here.

Each witness received a copy of our Rules of Procedure when served with a subpena. Fair, and informal procedure will be followed. Constitutional rights of witnesses will be protected in these proceedings. As provided by the Statute reading, "Witnesses at the hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights," a copy of which has been delivered to each witness with his subpena. This hearing or inquiry is not in any sense an adversary proceeding. The complaining parties who have submitted sworn statements will be called first. Then we will ask the appropriate public officials to testify. All testimony will be under oath. Any citizen who knows facts relevant to the issues is welcome to submit a sworn statement subject to our Rules of Procedure.

A transcript of the testimony of all witnesses will be made, and each witness shall have the right to inspect the record of his own testimony.

Let me conclude by restating the issue before us: Are certain citizens of the United States being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin?

Now we will call the first witness.

Testimony Begins

A number of Negro witnesses were called, all of whom testified that they had been refused the right to register in several Alabama counties. One of the witnesses, William P. Mitchell, an officer of the private Tuskegee Civic Association, read into the record what he described as a summary of the situation in Macon County:

The Macon County Board of Registrars has historically endeavored to deprive Negroes of the right to vote by employing different kinds of delaying and evasive techniques in order to slow down the process of application for registration, which is an indispensable step to becoming a registered voter. Throughout the years also, when pressures on the part of Negroes have reduced the effectiveness of these tactics, invariably all or most of the members of the board of registrars would resign, rendering the board nonfunctional and ineffective.

In other words, the increasing demands on the part of Negroes to exercise their constitutional guarantees as American citizens have been met with accelerated determination to deny Negroes directly or indirectly of the opportunity to vote. This tendency became significantly marked in the forties.

The significance of the above becomes more apparent when it is realized that according to the 1950 census report 27,384 of a total population of 30,561 in Macon County are Negroes. Of this number only 1,110 Negroes are registered voters. Of the approximately 3,177 white residents of the community, the current Macon County, 19% of all Negroes 25 years old or older white voters. When white residents under voting ages are accounted for, this suggests that considerably more than 95% of the white population of Macon County who are eligible to register and vote have registered and are eligible to vote.

The paucity of numbers of Negroes who have been made eligible to vote becomes even more meaningful when it is noted that among the counties of Alabama, Macon County ranks first in the proportion of Negroes 25 years or over with at least a high school education. In this County, 19% of all Negroes 25 years old or older have a high school education. This compares favorably with whites in the South and in Macon County. Additionally, Macon County ranks first in percentage of Negroes in the State of Alabama who possess college degrees.

An approximate chronological analysis of the stumbling block in the way of voter registration on the part of Negroes, suggest certain important factors which should be taken into consideration. The first obstacle which had to be overcome was the requirement by the board of registrars that only white electors could vouch for a Negro making application. Numerous court cases have been brought against the Macon County Board of Registrars in order to compel them to register all qualified citizens who apply.

On August 25, 1945, a class action court suit was filed against the Macon County Board in

the U. S. Federal Court for the Middle District of Alabama. At the same time, twenty-five cases were filed in the local state circuit court. On November 6, 1953, five Macon County Negroes filed a class action court suit in the U. S. Federal Court for the Middle District of Alabama.

Macon County has been without a publicly functioning board of registrars on numerous occasions. All members of the Macon County Board of Registrars resigned in 1946, following a civil court suit against them. It was revealed in a news release appearing in the Montgomery Advertiser, April 14, 1948, that the Macon County Board of Registrars was reconstituted during the month of January 1948 for the first time since 1946 (18 months). Apparently, no public notice was made of the set up of this board. Hence, no Negroes knew that it existed until after its chairman, Mr. S. Charles Parker of Tuskegee, Alabama, resigned to attend school. Mrs. S. Charles Parker is quoted as having said "He only accepted (the appointment) to let some service men register."

On April 19, 1948, scores of Negroes appeared at the Macon County Courthouse to make applications for certificates of registration. Many of them inquired of the Courthouse officials as to the identity of the personnel and the location of the board of registrars. Neither of these officials, according to those who sought registration, would reveal the registration place of the board. It was only after a very fair complexioned Negro (who could easily be mistaken for a member of the white race) inquired of a white person in the courthouse as to the whereabouts of the board, that its location was ascertained. On this date, 18 Negroes appeared and were permitted to make applications. After the board's location was determined by Negroes, the board did not function again publicly until January 17, 1949 (8 months later).

From July 1948, to January 1949, (six months) we were without a publicly functioning board. During this and other periods that Macon County was without a board, many petitions were filed; many conferences were held, and a voluminous amount of correspondence was written to the State Board of Appointments urging it to appoint a board of registrars.

Approximately eighteen months immediately preceding January 1948, there was no publicly functioning board. The Macon County Board of Registrars became inoperative on January 16, 1956, and did not function again publicly until June 3, 1957 (sixteen months later). During this period (January 16, 1957 until June 3, 1958) while we were trying to get a functioning board of registrars for Macon County, an Assistant Attorney General of Alabama, and now Attorney General-elect, stated before a Congressional hearing, according to a news story appearing in the Birmingham Post-Herald February 8, 1957, when asked concerning the lack of a Board of Registrars for Macon County, that "vacancies did exist but only for a short time and registration now is taking place". All total, Macon County has been without a publicly functioning board of registrars for 3 years and 4 months during the past 12 years.

The following is a resume of the number of applications taken and certificates issued to Negroes during the past eight years:

Year	*Applications Taken*	*Certificates Issued*	*Per Cent*
1951	161	23	14
1952	225	52	23
1953	182	28	15
1954	456	167	37
1955	258	119	46
1956	23	8	35
1957	78	26	33
1958	202	87 thru 11/15	43
Total	1585	510	32

While over the past eight years 1585 applications for registration were made by Negroes, and only 510 certificates of registration were issued to them, this does not begin to tell the whole story.

Hundreds of Negroes have appeared before the Macon County Boards of Registrars for the purpose of making applications for registration, but were not permitted to do so because of the board's policy of registering Negroes in a very small room, plus the fact that the board permits only two Negroes to make application simultaneously. In addition, many more would have appeared to make application if they had been reasonably sure that they could get into the registration room. This, of necessity, reduced greatly the number of Negroes who could conceivably have made applications in a given day.

From January 1, 1951 through November 15, 1958, the board has received an average of 198 Negro applications per year. It has issued an average of 64 certificates of registration per year.

The Alabama Bureau of Vital Statistics reports that 1,020 Negroes are born in Macon County each year and only 297 die, giving a sustained

increase of 723. At the present rate of issuing certificates to Negroes, it would require 203 years to register the approximately 13,000 unregistered Negroes in Macon County that are now 21 years of age and older. This analysis does not take into account that the Negro population is increasing each year.

Assuming that the in and out migration of Negroes of Macon County cancel out themselves, and assuming that this same birth/death ratio has always obtained, based on this ratio and other factors alluded to above, 5,784 Negroes reached voting age during these eight years. The board only registered 510 of this number, leaving a deficit of 5,274 unregistered Negroes.

While the rejection of 1,075 applications of Negroes by the Macon County Board of Registrars during the past eight years is extremely high, the basis of our complaint stems from the following tactics employed by the board which, we believe, are designed to keep Negro registration to a minimum:

1. The board's refusal to register Negroes in larger quarters.
2. Its failure to use the room which is assigned for the registration of Negroes to its fullest extent.
3. The board's requirement that only two Negroes can make applications simultaneously.
4. Its policy of registering whites and Negroes in separate rooms and in separate parts of the Macon County Courthouse.
5. Its policy of permitting a Negro to vouch for only two applicants per year.
6. Its requirements that Negroes who make application must read and copy long Articles of the U. S. Constitution.
7. Its failure to take applications from Negroes on several regular registration days.
8. Its failure to issue certificates of registration to Negroes immediately upon proper completion of the application form (for instance, until October 20, 1958, the board had not issued a certificate to Negroes since July 22, 1958—ninety days.

In an effort to seek relief from what we believed to be denials of voting rights for Negroes, we appealed to the Civil Rights Section of the U. S. Department of Justice on April 6, 1953.

On July 30, 1957, two members of the Voter Franchise Committee of the Tuskegee Civic Association appeared before twelve U. S. Senators in Washington, D. C. to relate to them the efforts made by Negroes in this county to become enfranchised.

On April 18, 1958, twenty Negroes filed affidavits with the Assistant Attorney General of the Civil Rights Division complaining of voter registration difficulties in Macon County.

While the present board was appointed on March 6, 1957, it did not function publicly until June 3, 1957. It gave as its reasons for the 90-day delay according to news-stories: "No equipment." And on April 20, 1957, a spokesman for the board was quoted as saying, "The office equipment has been shipped but it hasn't arrived yet". Since it has begun operations, 374 Negroes have appeared at the place of registration for the purpose of making applications for certificates. However, only 316 applications were made by Negroes during the period from June 3, 1957 through December 1, 1958. Of the number making applications, (and many made more than one) 112 Negroes received their certificates of registration, or 35.5%.

This board continues to employ the delaying methods alluded to in a previous paragraph. In addition, the present board failed to function publicly and take applications from Negroes on September 2, 1957, January 6 and 21, 1958, July 9, 1958, October 20, 1958, and December 1, 1958.

In an obvious effort to reduce the significance of Negro voting in city elections, our senator was instrumental in having enacted into law Senate Bill #291 that rearranged the city boundaries from a rectangle to a 32-sided figure. This rearrangement excluded all but approximately 10 of 420 Negroes who formerly voted in city elections. No whites were excluded in this rearrangement. As a further means to negate the effect of Negro voting, the Macon County Senator in the Alabama Legislature was instrumental in having a bill passed in the 1957 Legislature that would alter or abolish Macon County. This act proposes to apportion Macon to several of its abutting counties "where Negro voting is not yet a major problem." The Act was ratified by the electorate of Alabama on December 17, 1957. In commenting on this legislation, Macon County's Senator said, "no court could tamper with such a change in Alabama's county boundaries."

Even in our efforts to observe the work and behavior of the Macon County Board of Registrars we have met with difficulties. On July 5, 1957, the board summoned the sheriff to remove

from the vicinity of the place of registration a person who was presumed to be present to record the number of persons making application for registration. The board further threatened to cease work until after the person had left.

On September 1, 1958, the Macon County Board of Registrars, through one of its members, questioned still another Negro who was thought to be present at the courthouse to make record of the registration processes. This member allegedly stated to the Negro that unless she had business with the board "you have no reason to come back until January 1959".

Submitted,
William P. Mitchell
Chairman, Voter Franchise Committee
Tuskegee Civic Association

Dec. 7, 1958

Other Testimony; Statement by Gov. Battle

Subsequently, a number of election, registration, and judicial officials of Alabama were called to testify. Some of them refused to testify on various constitutional and statutory grounds, and declined to produce certain records which had been subpoenaed. At the conclusion of the first day's hearing, one of the members of the commission, John S. Battle, the former Governor of Virginia, issued the following statement:

I've come to the state of my ancestors. My father was proud to be an Alabamian. My grandfather, Collum A. Battle, was my constant companion during boyhood days and during the War Between the States the commanding officer of a brigade of Alabama troops which was honored by a resolution of the Confederacy thanking Alabama officers and men for their services to the Confederacy.

My grandfather was subsequently denied his seat in congress to which the people of Alabama had elected him because he served their cause. So I come to the people of Alabama as a friend. I think I may be permitted to say returning to the house of my father. And none of you white officials and citizens believe more strongly than I do in the segregation of the races as the right and proper way of life in the South.

It is my judgment the only way racial integrity can be preserved and thus be beneficial to both races. The President of the United States was not in error when in asking me to serve as a member of the commission he wanted someone with strong southern sentiments which I have and I accepted the assignment so I might be of some service to the country and the South.

It is from this background, ladies and gentlemen, that I am constrained to say in all friendliness I fear the officials of Alabama and of certain counties have made an error in doing that which appears to be an attempt to cover up their actions in relation to the exercise of the ballot by some people.

The majority of the next members of congress will not be friendly to the South and punitive legislation may be passed and this hearing may be used in the advocacy of that legislation which will be adverse to us in Virginia and to you in Alabama.

Of course it is not up to me nor would I presume to suggest to any counsel or any official for he should govern for himself. But we are adjourning this hearing until tomorrow morning and I may say to you, as one who is tremendously interested in the Southern cause, will you kindly reconsider the situation and see if there is not some way you, in fairness to your convictions, that the officials may co-operate a little bit more fully with this commission and not have it said by our own enemies that the people in Alabama were not willing to explain their conduct when requested to do so.

This may be entirely out of order, but it was in my heart to say it and I hope you will take it with the spirit with which I said it.

Statement by the Commission, December 9, 1958

After the second day of hearing, when various other officials had also refused to testify on constitutional grounds, the commission announced that it would refer the record to the Attorney General of the United States for further proceedings. (For subsequent court action, see 3 Race Rel. L. Rep. 97, supra.)

This Commission regrets the failure of certain persons to appear at this hearing after having been formally subpoenaed to appear in accordance with the provisions of the law creating this Commission, and the failure of others who have appeared in person to produce certain records that they were subpoenaed to produce, and the refusal of some who were physically present to be sworn as witnesses when requested to do so; and the failure of others to answer questions that were asked of them. In accordance with the terms of the law creating it (Public Law 85-315, enacted by the Congress of the United States on September 9, 1957), this Commission respectfully refers the complete record of this hearing to the Attorney General of the United States for such action as he deems appropriate to the end that will assist this Commission to have made available to it the information that is required to enable it to carry out the mandate of the law.

GOVERNMENTAL FACILITIES
Parks—Alabama

Because of a suit filed by Negroes in federal district court to compel the integration of Montgomery, Alabama, public parks, the Board of Commissioners of that city on December 30, 1958, adopted a resolution closing specified parks.

WHEREAS, eight negroes, namely, Georgia Theresa Gilmore, Gussie Carlton, Sylvia Johnson, J. C. Smith, Mattie Cargill, Fred Harris, George Stephens, and Elizabeth Brown, have attempted to compel the integration of Oak Park and other public parks in the City of Montgomery hereinafter designated, by suit filed in the Federal District Court; and

WHEREAS, this attempt poses grave problems involving the welfare and public safety of all of the citizens of the City of Montgomery; and

WHEREAS, the members of the Commission are of the opinion that it is to the best interests of the citizens of Montgomery that said parks be closed:

NOW, THEREFORE, BE IT RESOLVED by the Board of Commissioners of the City of Montgomery, Alabama, that the following public parks in the City of Montgomery, to-wit,

[*There follows a designation of the names and location of 12 parks after which the resolution concludes:*]

be closed beginning January 1, 1959, to all persons, regardless of color, until further action of the Parks and Recreation Board and the Mayor and Commissioners of the City of Montgomery.

REFERENCE

Freedom of Association

I Introduction

The activity of the National Association for the Advancement of Colored People (NAACP) directed toward asserting and furthering alleged constitutional rights against segregation has evoked a widespread reaction in the southern states in recent years. Since the decision in the *School Segregation Cases*, state legislatures have enacted a series of statutes obviously and sometimes expressly designed to control the activities of associations attempting to combat discrimination on the basis of race, color, creed or national origin. The legislation dealing with the

offenses of champerty, maintenance and barratry has already been discussed in a previous study. See *Inciting Litigation*, 3 Race Rel. L. Rep. 1257 (1958). As a further measure of counterattack, several states have adopted laws which seek to exploit the traditional powers of the state legislature to conduct investigations, to define the scope of the criminal law, and to regulate the local operations of foreign corporations and associations. This type of legislation is currently coming under attack in the courts, not only on the familiar grounds of due process and equal protection, but also on the more novel charge that an alleged right of freedom of association is being violated. This study will examine the basis of this new area of constitutional rights and the statutes and decisions out of which it has developed.

Consideration will also be given to a number of other incidents in American history involving repressive action against particular groups deemed dangerous in the locality. The legal framework in which these incidents arise will provide possible analogies and contrasts for use in studying current legal efforts directed against the NAACP.

A. A New Constitutional Concept

Just as the intense controversy over fugitive slave laws a century ago brought out constitutional principles which outlived slavery—*e.g.*, *Abelman v. Booth*. 62 U.S. 506, 16 L.Ed. 169 (1858)—the current court battles over desegregation are producing case law with implications reaching far beyond the area of bitter controversy in which the cases are arising. Perhaps the outstanding single development of this kind so far was the announcement in June, 1958, of a new constitutional right—or at least a new official concept of constitutional law—called "freedom of association." In *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, 3 Race Rel. L. Rep. 611 (1958), the Supreme Court of the United States not only made use of this phrase for the first time in a square constitutional holding but also gave it significant content as a protection against forced disclosure of the membership of an unpopular organization.

B. An Old Problem

The phrase is new only in its legal setting and specific content. It has been included in modern constitutions of some European nations and in Art. 20, Universal Declaration of Human Rights promulgated by the General Assembly of the United Nations, Dec. 10, 1948. Writers have advocated use of the phrase "freedom of association" as a desirable heading for classifying certain constitutional holdings now scattered under "freedom of speech," "freedom of assembly," "freedom of the press," and so on. See, *e.g.*, Horn, *Groups and the Constitution*, (1956); Abernathy, *The Right of Association*, 6 S.C.L.Q. 32 (1953). Similar phrases have appeared often enough in opinions of the individual justices of the Supreme Court of the United States to indicate its gradual acceptance by the court. *Sweezy v. New Hampshire*, 354 U.S. 234, 249, 250, 77 S.Ct. 1203, 1211, 1212, 1 L.Ed.2d 1311, 1324, 1325 (1957) (principal opinion by four justices); *Wieman v. Updegraff*, 344 U.S. 183, 194-5, 73 S.Ct. 215, 220, 97 L.Ed. 216, 223 (1952) (concurring opinion); AFL v. American Sash & Door Co., 335 U.S. 538, 540, 69 S.Ct. 258, 259, 93 L.Ed. 222, 224 (1948); *United Public Workers, CIO v. Mitchell*, 330 U.S. 75, 114, 67 S.Ct. 556, 576, 91 L.Ed. 754, 780 (1946); *Bridges v. Wixon*, 326 U.S. 135, 163, 65 S.Ct. 1443, 1456, 89 L.Ed. 2103, 2119-20 (1945).

Just as the phrase is not new, the controversy which brought it to its present eminence will be found to have both direct and collateral antecedents. The immediate background, of course, is a part of the South's reaction to the *School Segregation Cases*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, 1 Race Rel. L. Rep. 5 (1954). This reaction included not only negative measures aimed at resisting the progress of desegregation, but also vigorous affirmative measures equivalent to a counterattack. See *Race Relations Law Survey*, 2 Race Rel. L. Rep. 881, 889, 892 (1957). A prime target of most of these counter-measures has been the National Association for the Advancement of Colored People. As late as three months after the decision in *NAACP v. Alabama, supra*, the attorney general of Arkansas announced a six-point plan of attack based on this principle: "No NAACP, no NAACP-inspired law suits, no federal integration orders, no more Little Rocks." Arkansas Gazette, Oct. 3, 1958. His six points were summarized in the Gazette thus:

> "1. Withdrawal of NAACP tax deduction privileges. He contended that the NAACP had built up huge funds which were being

used to stir up litigation, recruit plaintiffs and pit 'race against race.'

2. The filing of barratry charges under new state laws against lawyers who recruit integration lawsuits.

3. More arrests—on laws prohibiting vagrancy and inciting riots—of persons who 'appear to be attempting' to divide the people.

4. The formation of 'economic safety committees' in local communities by civic and business leaders. The members, [the attorney general] said, could locate 'troublemakers' in their community and take 'necessary steps to effect economic reprisals against such people.'

5. Enact state legislation to 'end bonus welfare payments' for illegitimate children. [The attorney general] said the law now provided such payments for up to six illegitimate children. He said some Negro mothers used these welfare checks to pay NAACP dues.

6. The passage of . . . ordinances by city councils to force the NAACP to reveal the identity of members and contributors. The ordinances, [he] said, will force the 'troublemakers' out into the open."

This is the Arkansas adaptation of the program of counterattack already well under way in many Southern states. See Sec. III, *infra*. Parenthetically, it might be noted that the target organization in this instance is one given commendation by Federal Bureau of Investigation Director J. Edgar Hoover in his book *Masters of Deceit*, and whose litigation position has been supported frequently by the Attorney General acting on behalf of the United States.

Even the earliest states to act in the current controversy, found little need for improvising entirely new ideas for official attack on an unpopular organization. Indeed, Louisiana had only to invoke a thirty-year-old registration statute originally passed with the Ku Klux Klan as the target organization. La. Acts, 1924, No. 2, La. Rev. Stat. §§ 12:401-09 (1950); *Louisiana ex rel. LeBlanc v. Lewis*, 1 Race Rel. L. Rep. 571 (La. Dist. Ct. 1956); see discussion, Sec. III, *infra*. Other fruitful sources of ideas, together with court decisions pointing out weaknesses to be avoided, could be found in the annotated statutes and reports of proceedings of virtually all the states and the federal government. The organizations affected ranged from apparently innocuous societies—see, *e.g.*, *People ex rel. Niger v. Van Dell*, 85 Misc. 92, 146 N.Y. Supp. 992 (1914) (Order of the Owls)—to those identified with wartime sabotage—see, *e.g.*, *State v. Moilen*, 140 Minn. 122, 167 N.W. 345 (1918) (Industrial Workers of the World).

The newly-declared right of association cannot be assessed merely in relation to the current Southern counterattack on the NAACP, divorced from the administrative, legislative and judicial precedents established in relation to other organizations which have encountered official wrath in the past.

II Precedent

When the activity which brings an organization under official displeasure is a violation of a serious criminal law already in force and the participants may be readily caught at it, suppression involves little more than stirring policemen to their duty. Conversely, when the activity is entirely innocent and harmless, and is recognized as such by the community at large, no campaign of suppression can maintain the trappings of legality for any considerable period of time. Between these extremes of ease and difficulty lie most of the legal problems of freedom of association. Some of the difficulties are suggested by Professor Horn:

"Every type of the great associations has at one time or another been considered subversive. In the sixteenth and seventeenth centuries religious wars reflect this belief about churches. Common law doctrines of conspiracy applied to labor unions in the eighteenth and nineteenth centuries manifest the same conviction. Even fraternal groups have not been free from

suspicion, as the history of freemasonry shows. . . .

The subversive character of a group is a matter of opinion. History reveals that opinion about the subversive nature of these groups has differed among different societies at the same time and has also changed in the same society over a period of time. . . .

Needless to say, none of these associations ever has regarded itself as subversive. Locke said pithily that 'every church is orthodox to itself.' Even if a group openly proclaims a purpose to destroy the political institutions of a society, it will do so in the name of benefitting that society as distinguished from its government." Horn, *op. cit., supra,* at 123.

Without regard to any judgments as to the innocence or criminality of the organization or as to the justification of suppression, there appears to be a pattern to the methods used by American government officials against specific organizations in the past. Roughly classified, the methods fall into three general groups:

(A) Enforcement and expansion of existing criminal laws.

(B) New or more meticulous application of existing administrative and regulatory powers and creation of new ones.

(C) Efforts to bring the pressure of public opinion against the group and its members.

A good deal of overlapping of these classifications will be noted in the specific cases to be considered below, and the use of the injunctive powers of equity courts have been invoked to reinforce action within each of these classifications.

A. Criminal Law Approach

1. State Statutes

The simplest possible approach, of course, is to catch members of the target organization in overt criminal acts and prosecute them according to law.

a. Conspiracy Laws

One step beyond this most direct action would be enforcement of the common law of conspiracy. This approach was used as early as 1806 in the *Philadelphia Cordwainers' Case,* 3 Commons & Gilmore, *A Documentary History of American Industrial Society* at 59 (1910) and similar legal assaults on striking unions, mostly of boot and shoemakers, in the early portion of the 19th century. See Nelles, *Commonwealth v. Hunt,* 32 Colum. L. Rev. 1128 (1932). Although often altered by statute, this old English crime is still an indictable offense in many of the United States. For conviction, it is only necessary to prove that two or more persons conspired together to do an unlawful thing, or to do a lawful thing by unlawful means. 8 Cyc. 620-2 (1903); 15 C.J.S. *Conspiracy* § 1 (1939). The most common statutory alteration is to require that some overt act be committed toward effecting the object of the conspiracy. See, *e.g.,* Tenn. Code Ann. § 39-1102 (1956). In conjunction with an Illinois statute which treats an accessory before the fact as if he were a principal [Ill. Ann. Stat. C. 38 § 582 (Smith-Hurd 1935),] the rules of conspiracy were used as a basis for finding eight persons guilty of murder in the Haymarket bombing of 1886, although the person who threw the bomb was not identified. *Spies v. People,* 122 Ill. 1, 12 N.E. 865, 17 N.E. 898 (1887), *writ of error denied,* 123 U.S. 131, 8 S.Ct. 21-22, 31 L.Ed. 80 (1887). The organization involved was the International Association of Workingmen.

b. Hood and Mask Laws

Another method whereby the reach of the law may be extended where failure of actual commission of a crime or failure of proof hinders prosecution is passage of a statute providing for a prima facie presumption upon proof of other acts which a legislature may deem indicative of an intent to commit a crime. Tennessee, where the Ku Klux Klan was born, used this as one of the devices for suppressing the Klan despite its brief period of respectability in the immediate aftermath of the Civil War. The Tennessee Legislature decreed in Public Acts 1869-70, Ch. 54, § 2, Tenn. Code Ann. § 39-2802 (1956):

"If any person or persons, disguised or in mask, by day or by night, shall enter upon the premises of another, or demand entrance or admission into the house or inclosure of any citizen of this state, it shall be considered prima facie that his or her intention is to commit a felony, and such

> demand shall be deemed an assault with intent to commit a felony, and the person or persons so offending, shall, upon conviction, be punished by imprisonment in the penitentiary not less than ten (10) years nor more than twenty (20) years."

So far as the official Tennessee Reports show, the statute has at least had the effect of turning a masked chicken thief into a felon. *Walpole v. State*, 68 Tenn. 370 (1878). Its effect on the Ku Klux Klan may have been equally salutary without having appeared in the appellate court reports.

Like other legislatures dealing with organizations they deem dangerous, the Tennessee General Assembly did not stop with creating a presumption to facilitate prosecutions for presumed felonies, but at the same time created new substantive offenses based on similar evidence associated with the target organization. Section 1 of the same Act [Tenn. Code Ann. § 39-2801 (1956)] makes it a misdemeanor to prowl masked or in disguise, disturbing the peace or alarming the citizens, and Section 3 [Tenn. Code Ann. § 39-2803 (1956)] provides that one committing assault with a deadly weapon while masked shall be guilty of assault with intent to commit murder in the first degree.

These hood and mask laws and ordinary conspiracy laws were not deemed adequate, however, when a new masked order arose in the state toward the end of the century. By Public Acts 1897, Ch. 52 [Tenn. Code Ann. §§ 39-1106-7 (1956)] the Legislature made it a felony to conspire to take human life, "or to engage in any act reasonably calculated to cause the loss of life . . . or to inflict corporal punishment or injury, whether generally or upon a class or classes . . . or to burn or destroy property or to feloniously take the same. . . ." The statute extended the penalty to anyone who directly or indirectly aided, abetted or encouraged anyone else to engage in such a conspiracy. The Tennessee Supreme Court held forty-four years later that this statute was aimed at the White Caps organization and declined to apply it to members of a labor union convicted of conspiring to inflict serious bodily harm on a nonunion employe. *Asbury v. State*, 178 Tenn. 43, 154 S.W. 2d 794 (1941).

c. Red Flag Laws

As the hood and mask had been seized upon as symbols of a new criminal category applicable to the Ku Klux Klan, the red flag came to be viewed by many state legislatures as the manifestation of a threat justifying legislation directed at bolsheviks and other communist and socialist groups. In one early case, display of a red flag was ruled a proper basis for conviction under a riot statute which did not mention flags, merely because of its declared tendency to incite riots. *People v. Burnam*, 154 Mich. 150, 117 N.W. 589 (1908). Professor Chafee listed thirty-three states as having adopted legislation which he classified as "red flag laws," prior to 1941. Chafee, *Free Speech in the United States* 575 (1941). In his text Chafee summarizes them thus:

> "The New York Statute makes it a misdemeanor to display the banner 'in any public assembly or parade as a symbol or emblem of any organization or association, or in furtherance of any political, social, or economic principle, doctrine or propaganda.' Other states go much further and forbid the display of the red flag anywhere. Some shrewdly guard against the wearing of red neckties or buttons or the evasive adoption of a green flag by punishing the use of any emblem of any hue if it is 'distinctive of bolshevism, anarchism, or radical socialism'; or indicates 'sympathy or support of ideals, institutions, or forms of government hostile, inimical, or antagonistic to the form or spirit of the constitution, laws, ideals, and institutions of this state or of the United States.'" Chafee, *supra*, at 159.

The reported cases prosecuted under these laws are not as numerous as might have been expected from the number of states adopting them. See *Commonwealth v. Karvonen*, 219 Mass. 30, 106 N.E. 556 (1914) (sustaining validity of statute); *Ex Parte Hartman*, 182 Cal. 447, 188 Pac. 548 (1920) (invalidating municipal ordinance); Annots. 20 A.L.R. 1548 (1922), 40 A.L.R. 958 (1926), 73 A.L.R. 1500 (1931).

The single red flag case which reached the Supreme Court of the United States actually involved daily youth camp pledges of allegiance to the hammer and sickle banner of the Communist Party in the United States, identical to the flag of the Soviet Union. *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). In that case Yetta Stromberg, a nineteen-year-old American girl of Russian parentage, was a camp leader who led children each morn-

ing in a pledge of allegiance "to the worker's red flag, and to the cause for which it stands; one aim throughout our lives, freedom for the working class." She was convicted under a charge which permitted the jury to find her guilty if the state had proved the flag was displayed for any of three purposes mentioned in the California statute and in the indictment. One of these was display "as a symbol and emblem of opposition to organized government." The California District Court of Appeal conceded that this purpose might include peaceful opposition, but found the other two purposes on which the jury might have based its general verdict—"Invitation and stimulus to anarchistic action" and "aid to propaganda that is of a seditious character"—were within the permissible area of the state's legislative power, and therefore justified the conviction. *People v. Mintz*, 106 Cal. App. 725, 290 Pac. 93 (1930). The Supreme Court of the United States on Miss Stromberg's appeal (Mintz, a co-defendant, won his case in the state court), took the view that if, under the charge, the jury might have based its verdict on advocacy of peaceful revolution, the conviction violated her constitutional rights. The conviction was therefore reversed.

d. Criminal Syndicalism Laws

The ultimate in criminal statutes aimed at a particular organization would outlaw all activities associated with the target organization, including membership in it. This extreme was approached in the criminal syndicalism statutes, most of which were modeled on that of Idaho, Idaho Code Ann. §§ 18-2002,-4 (1947). In the years following the United States' entry into World War I, twenty states adopted such statutes in almost identical form, "directed mainly against the Industrial Workers of the World." Chafee, *op cit, supra*, at 326. The California statute, Cal. Gen. Laws Ann. Act 8428, § 1 (Deering 1954) was one of the most diligently enforced. It provides for imprisonment from one to fourteen years of anyone who advocates, teaches, aids, abets, wilfully attempts to justify or publishes or circulates matter advocating or advising criminal syndicalism, or who organizes, assists in organizing, or *knowingly becomes a member* of any group organized to advocate it. The crime of criminal syndicalism is defined as

> "any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change." Cal. Pen. Code p. 773 § 1 (appendix) (Deering 1949).

Thus, it was at least theoretically unlawful to belong to an organization formed to advocate the advocacy of unlawful acts. This is about as far as the long arm of the law could be extended, but even so the statute appears to have left room for the Wobblies, as the members of the IWW were called, to have moved out of its reach by halting their violent ways and talk and by operating as a peaceful union should. According to Professor Chafee, however, even this change of tactics would not have averted the convictions in California. Chafee, *supra*, 326-42. He analyzed the cases as resting largely on testimony by a few professional witnesses about actual sabotage committed before the law was passed and on the contents of well-worn IWW pamphlets which had been long in circulation.

> "In short, the state of California was using its Criminal Syndicalism Act, not to punish actual sabotage or other unlawful acts, but to suppress general printed discussions and stamp out this queer kind of industrial union." Chafee, *supra*, 340. For a summary of the results of the numerous prosecutions see 10 Calif. L. Rev. 512 (1922); 19 *id.* 64 (1930); 23 *id.* 181 (1935).

After more than 500 arrests and more than 250 trials for violations of the Act, California administered the coup de grace with an injunction which, read against the background of the repeated decisions that the IWW was an organization for promoting criminal syndicalism, effectively abolished the organization as a legal entity. Chafee, *supra*, at 328.

In its first test before the Supreme Court of the United States, the law was held constitutional on its face. The case involved the Communist Labor Party rather than the IWW, but the party's praise of the IWW in its platform apparently played a major role in the case. *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927); see Chafee, *op. cit., supra*, 343-54. Both the court and the specially

concurring justices pointed out that the review was narrowly limited to the constitutionality of the statute as applied, and the record did not justify a review of the trial court's procedural rulings under it. Thus, California not only wiped out the IWW within the state, but also succeeded in applying the state's repressive statute to a person who helped to form a state party organization within a national party which had approved the methods of the IWW.

On the same day the Supreme Court upheld the California law, however, it reversed a conviction under the similar Kansas law. *Fiske v. Kansas*, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108 (1927), in which the record on appeal adequately showed the lack of evidence to support the conviction. The defendant, an IWW organizer, was convicted of advocating criminal syndicalism primarily on the basis of the preamble of the union's constitution which did not mention violence but only an unceasing struggle between the working class and the employing class.

For the most part, the criminal syndicalism statutes were upheld in the state appellate courts. The cases are collected in Annots. 1 A.L.R. 336 (1919), 20 A.L.R. 1543 (1922), and 73 A.L.R. 1498 (1931). The exceptional decisions appear to have concerned statutes which varied from the emphasis on violence and criminal activity. *E.g. State v. Diamond*, 27 N.M. 477, 202 Pac. 988 (1921), invalidated a statute which denounced all acts, peaceful or otherwise, aiming at the destruction of organized government, or acts inciting or attempting to incite revolution.

The IWW largely disappeared as a center of controversy after the decade of prosecutions ending in the late 1920's, though its industrial union theories were carried forward by the CIO and its political theories by the Communist Party. Enough of it remained, however, to become the first labor organization to be listed as subversive by the federal government in 1949. See 12 *Encyclopedia Britannica* 310, 311.

The syndicalism statutes remained on the books, and the Supreme Court of the United States again considered one of them ten years after the *Whitney* and *Fiske* decision. *De Jonge v. Oregon*, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937). This time the IWW was not remotely involved. Dirk de Jonge had spoken at a meeting called by the Communist Party in protest of police activity during a longshoremen's strike in Portland in 1934. Although the stipulation of facts was that there was no evidence of any advocacy of syndicalism at the meeting, de Jonge was convicted under a provision of the Oregon statute prohibiting anyone from assisting in conducting a meeting of a group which advocated criminal syndicalism.

> "His sole offense as charged," said the Chief Justice for the United States Supreme Court, "and for which he was convicted and sentenced to imprisonment for seven years, was that he had assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party." 299 U.S. at 362.

Such an extreme application of the Oregon statute was held to be repugnant to the due process clause of the Fourteenth Amendment.

The Chief Justice discussed the rights protected by the due process clause from infringement by the state and declared:

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. . . ." 299 U.S. at 364-5.

2. Federal Statutes

The United States government has proceeded in much the same way as the states when moving against organizations deemed undesirable or dangerous.

a. Ku Klux Klan Law

Again, the simplest form of special criminal legislation was an Act aimed at the Ku Klux Klan, ch. 22, § 2, 17 Stat. 13 (1871), R.S. § 5519 (1873), providing:

> "[I]f two or more persons within any State or Territory of the United States . . . shall conspire together; or go in disguise upon the highway or on the premises of another for the purpose of depriving, either directly or indirectly, of depriving any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or secur-

ing to all persons within such State the equal protection of the laws, . . ." each of said persons shall be punished.

This section was declared unconstitutional by the Supreme Court of the United States in a case in which the government sought to apply it to twenty private individuals who took prisoners from a Tennessee deputy sheriff, beat them and lynched one. *United States v. Harris*, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290 (1883); see *Substantive Civil Rights Under Federal Legislation*, 3 Race Rel. L. Rep. 133, 138 (1958).

b. Smith Act

Congressional action against the Communist Party has been more successful, and more extensive. The main effort to outlaw the party as such came in the passage and enforcement of the Smith Act of June 28, 1940, 54 Stat. 670 (1940), as recodified, 62 Stat. 808 (1948), 18 U.S.C. 2385 (1952). The portions of the Act invoked against the leaders of the national party provided, at the time of the case:

"Sec. 2. (a) It shall be unlawful for any person—

(1) To knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of such government;

(2) with intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purpose thereof.

. . . .

Sec. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of . . . this title."

The similarities between these provisions and those of the syndicalism laws is immediately apparent. Like the syndicalism statutes, see *supra*, p. 212, the law has, at least on its face, a long reach in terms of the number of steps in advance of armed revolt that may justify its application in the interest of preventing such a revolt. The law denounces a conspiracy to form, or affiliate with, an organization whose purpose it is to advocate the overthrow of government by force or violence. This conspiracy is one step ahead of the actual formation of or affiliation with the organization, two steps ahead of actual advocacy, and three steps ahead of attempted revolt. And by analogy to the criminal law rules applicable to the crime of assault, even attempted revolt is legally one step removed from actual revolt—and actual revolt must succeed in order to accomplish the overthrow of the government. However, the construction put upon the statute by the federal courts which have enforced it has narrowed it from the broad possibilities suggested by the words of the statute. *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957); *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951).

In the *Dennis* case, the top leaders of the Communist Party were convicted of violating the Act and the Supreme Court upheld the conviction. The prevailing opinion of four justices indicated that the court gave considerable weight to the successful formation of the party and proof of actual advocacy. Indeed, Chief Justice Vinson used the term "conspiracy" at one point, not in the sense of conspiracy to advocate, or conspiracy to organize, but to describe the party itself as a conspiracy to overthrow the government. He wrote, in the opinion of the court, 341 U.S. at 510-11, 71 S.Ct. at 868, 95 L.Ed. at 1153:

"The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions,

similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score."

On the other hand, Justice Black said in his dissent 341 U.S. at 579, 71 S.Ct. at 902, 95 L.Ed. at 1188:

"At the outset I want to emphasize what the crime involved in this case is, and what it is not. These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government."

In the *Yates* case, the Court rejected Justice Black's view. Justice Harlan, writing for the court, quoted the portion of Chief Justice Vinson's opinion set out above, 354 U.S. at 323-4, 77 S.Ct. at 1079-80, 1 L.Ed.2d at 1378, and added:

"Dennis was thus not concerned with a conspiracy to engage at some future time in seditious advocacy, but rather with a conspiracy to advocate presently the taking of forcible action in the future. . . . We intimate no views as to whether a conspiracy to engage in advocacy in the future, where speech would thus be separated from action by one further removed, is punishable under the Smith Act."

The court reversed the convictions below, holding that the trial court erred in not charging the jury specifically enough that the advocacy which will support conviction must not be merely of abstract doctrine but *"of a rule or principle of action* and *by language reasonably and ordinarily calculated to incite persons to such action,* all with the intent to cause the overthrow" of the government. 354 U.S. at 326, 77 S.Ct. at 1081, 1 L.Ed.2d 1379. (Emphasis by the court in quoting from the charge approved in *Dennis.*) The court also held that that clause of the Smith Act denouncing organization could not be applied to formation of subsidiary organizations, but must apply to the formation of the main organization only; it was held that prosecution for the latter acts was barred by the three-year statute of limitations at the time of the indictment. 354 U.S. at 312, 77 S.Ct. at 1073, 1 L.Ed.2d at 1371-2.

c. Subversive Activities Control Act

Congress itself apparently limited the broad nature of the Smith Act conspiracy provisions in the Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U.S.C. § 783 (f)(1952), by providing:

"(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. . . ."

At any rate the Supreme Court placed this construction on it in assessing the evidence in the *Yates* case, 354 U.S. at 330, 77 S.Ct. at 1082, 1 L.Ed.2d at 1382. In the same Act, however, Congress provided a new criminal offense—conspiring to do any act which would substantially contribute to establishing a dictatorship—and also set up administrative procedures which will be considered in subsection B, *infra.*

B. Administration and Regulation

1. Pre-existing Powers

The infinite possibilities for the use of the ordinary powers of administrative and police officials against particular groups, especially when the groups or the ideas they espouse are not popular in the area affected, are suggested by Professor Chafee in his discussion of the use of Boston's building code, Chafee, *op.cit, supra,* at 526-7.

"[N]o law authorizes the mayor to forbid any meeting in advance because of its purpose, or to punish the owner of a hall for permitting a meeting against the mayor's orders. Yet in actual practice a mayor has often exercised such a power by threatening halls where forbidden meetings are held with proceedings for structural defects.

> The mayor can usually find a statute authorizing him to revoke the license of a hall because of such defects as insufficient fire exits or too narrow staircases or improper building materials. Past mayors of Boston have used such a statute to prohibit meetings to promote the Ku Klux Klan or advocate the repeal of the Massachusetts law against birth control. No owners of halls dared disobey the mayor, since no matter how much care had been taken in the construction and repairs of a hall, some violation of the complicated building regulations probably existed, for which the mayor could if defied revoke the owner's license and deprive him of all profits from his investment for some time to come. No hall-owner cared to risk everything on the chance that a court would eventually restore his license. . . .
>
> Moreover, the authorities in charge of architectural defects do more than make the initial decision as to the desirability of the subject-matter of meetings in halls. Their initial decision is also the final decision for all practical purposes. Even if an adventurous hall-owner should carry the matter into the courts, he could not get judicial relief until long after the day set for the meeting."

Compare the discussion of "Misconduct in Office," Perkins, *Criminal Law*, pp. 409-420, and 18 USCA § 242.

a. Permits for Public Meetings

Nevertheless, this practical power of local officials to discriminate between groups on the basis of their personal judgments, rather than statutory standards, has been challenged before the Supreme Court of the United States in some types of cases. In Havre de Grace, Maryland, a permit was denied for a Jehovah's Witnesses meeting in a public park, apparently on the basis of the city council's dissatisfaction with the Witnesses' views on the flag salute, the Catholic Church, bearing of arms, and so on. The Supreme Court reversed convictions of some of the Witnesses for holding a meeting without a permit. *Niemotko v. Maryland*, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951). The City of Pawtucket, Rhode Island, on the other hand banned any religious or political addresses in its parks, and allowed assemblies in the parks without a permit so long as there was no public address. It did not always enforce the speech ban against religious groups. One of the convictions it did obtain was therefore struck down as discriminatory. *Fowler v. Rhode Island*, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953). The court could see no difference between discriminatory enforcement of an absolute ban and discriminatory denial of permits. On the other hand, the court readily saw the procedural point when the Supreme Court of New Hampshire held that a preacher's relief from improper denial of a license to use a public park was an action in mandamus to require the city officials of Portsmouth, New Hampshire, to issue the desired permit. The court therefore affirmed the state's conviction of a Jehovah's Witness who preached in a park without a permit. *Poulos v. New Hampshire*, 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105 (1953). These decisions, of course, do little to solve the problem posed by Professor Chafee about the finality of local officials' decisions in cases of applicants for permits who cannot afford to appeal from five-dollar fines or to bring actions in mandamus.

b. Registration of Foreign Corporations

At the state level similar opportunities exist, particularly in the corporation, license, and taxation laws. Perhaps the most open use of these opportunities against organizations has occurred under laws requiring registration of foreign corporations. The long-established principle that a corporation is an artificial creature of the state, *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636, 4 L.Ed. 629, 659 (1819), produced the corollary that it could have no existence outside the borders of the sovereignty which created it. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588, 10 L.Ed. 274, 306 (1839). Therefore, with respect to local activities within the state, a state may exclude a foreign corporation or prescribe the conditions of entry. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 19 L.Ed. 357 (1869). This principle has been generally accepted as applicable to nonprofit corporations as well as to commercial enterprises, but most of the decisions involve the capacity of the corporation in relation to civil actions rather than state efforts to exclude the corporation. *E.g., General Conference of Free Baptists v. Berkey*, 156 Cal. 466, 105 Pac. 411 (1909); *High v. Supreme Lodge of the World, Loyal Order of the Moose*, 289 N.W. 519 (Minn. 1940). But see *Eaton v. Woman's*

Home Missionary Society of the Methodist Episcopal Church, 264 Ill. 88, 105 N.E. 746 (1914).

In at least three cases the power has been asserted by the state against non-profit corporations. Two of these concerned the Ku Klux Klan. *State ex rel. Griffith v. Knights of the Ku Klux Klan*, 117 Kan. 546, 232 Pac. 254 (1925); *People v. Jewish Consumptives' Relief Society*, 92 N.Y.S. 2d 157 (1949); *Knights of the Ku Klux Klan v. Commonwealth*, 138 Va. 500, 122 S.E. 122 (1924).

In the Virginia case, the State Supreme Court of Appeals upheld a fine levied against the Ku Klux Klan, a Georgia corporation, for doing business in the state without complying with its domestication statute. The court declined to consider the Klan's contention that it was being discriminated against in that similar actions had not been taken against other foreign organizations. Other than this brief reference, the court's opinion gave no indication of any special official displeasure with the Klan for any reason other than its failure to comply with the domestication laws.

In the Kansas case, on the other hand, the state based its quo warranto action on two counts: (1) that the Klan was an undomesticated foreign corporation doing business in Kansas, and (2) that it was stirring race and religious prejudices and animosities, and using threats, intimidations and violence to compel others to agree with its members' views and to obey their commands. The Kansas court, however, accepted a commissioner's finding that there was no evidence to support the second count. The writ of ouster was granted on the single ground that it was doing business in the state without the requisite permission from the state charter board.

In the New York case, the court granted a temporary injunction to restrain the Jewish Consumptives' Relief Society, a non-stock foreign corporation, from raising funds in New York, an activity found to be unauthorized by the corporation's certificate to do business in New York. The court cited both of the *Ku Klux Klan* cases, *supra*, as well as the Minnesota *Moose* case, *supra*.

2. New Powers

a. Tax Exemption

California, which had been the most active state in enforcement of criminal syndicalism laws, expanded its arsenal of weapons for use against subversive groups in the field of taxation by passage of a constitutional amendment in 1952. Cal. Const. art. XX, § 19. This amendment provides in part:

> "[N]o person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:
>
> ....
>
> (b) Receive any exemption from any tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this state."

The following year the California Legislature provided for a test oath as a means of enforcing the constitutional provision. Cal. Rev. and Tax. Code, § 32 (Deering Supp. 1957). This statute requires any claim of a tax exemption other than a householder's exemption to include "a declaration that the person or organization . . . does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in event of hostilities."

The penalty for failure to make the required declaration would be denial of the claimed exemption. Making the declaration falsely was declared to be a felony.

Two claimants of a veterans tax exemption and two churches contested the provision. On appeals from varying decisions in the lower courts in Los Angeles, San Francisco and Contra Costa counties, the Supreme Court of California upheld the constitutional amendment and the statute. *First Unitarian Church v. Los Angeles*, 48 Cal. 2d 419, 311 P.2d 508 (1957); *Prince v. San Francisco*, 48 Cal.2d. 472, 311 P.2d 544 (1957); *People's Church v. Los Angeles*, 48 Cal. 2d 899, 311 P.2d 540 (1957); *Speiser v. Randall*, 48 Cal. 2d 903, 311 P.2d 546 (1957). In so holding, the California court ruled that the provision could not be applied to penalize mere belief or advocacy of abstract doctrine but only that advocacy which could be punished under the state criminal syndicalism act or the federal Smith Act. 48 Cal.2d at 428, 311 P.2d at 517.

On certiorari, the Supreme Court of the

United States reversed all four cases. *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958); *First Unitarian Church v. Los Angeles*, 357 U.S. 545, 78 S.Ct. 1350, 2 L.Ed.2d 1484 (1958). For purposes of these cases the court assumed without deciding "that California may deny tax exemptions to persons who engage in the proscribed speech for which they might be fined or imprisoned." 357 U.S. at 520, 78 S.Ct. at 1339, 2 L.Ed.2d at 1469. It was held that "when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition. . . . Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, appellants were not obliged to take the first step in such a procedure." 357 U.S. at 328-9, 78 S.Ct. at 1343-4, 2 L.Ed.2d at 1474-5.

The court distinguished previous cases in which it had sustained the validity of loyalty oaths required as a condition of public employment, *Garner v. Board of Public Works*, 341 U.S. 716, 95 L.Ed. 1317, 71 S.Ct. 909 (1951); of being a candidate for public office, *Gerende v. Board of Supervisors*, 341 U.S. 56, 95 L.Ed. 745, 71 S.Ct. 565 (1951); and of union use of the facilities of the National Labor Relations Board, *American Communications Assoc. v. Douds*, 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 674 (1950). The court said, 357 U.S. at 527, 2 L.Ed.2d at 1473, 78 S.Ct. at 1343:

> "In these cases, however, there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern."

Other cases on licensing and tax regulations affecting free speech are collected in Annot., 93 L.Ed. 1180, 1182 (1950). On the validity of governmental requirements for loyalty oaths, see Annots. 97 L.Ed. 226 (1954), 18 A.L.R.2d 268 (1951).

b. Election Laws

Election laws are a natural means of attack against political parties and other organizations with political objectives. Arkansas provided in 1935 for denial of a place on the ballot to candidates of any party advocating the overthrow of the government by force. Ark. Acts 1935, No. 33, § 1. This section was amended to name the Communist Party specifically in 1941. Ark. Acts 1941, No. 293, § 1, as amended, Ark. Stat. §§ 3-1604-5 (1947). The statute was upheld in *Field v. Hall*, 201 Ark. 77, 143 S.W.2d 567 (1940). Illinois chose to strike at all small or geographically limited political parties with a statute requiring that petitions to form and nominate candidates for a new political party must bear the signatures of at least 25,000 qualified voters, including at least 200 voters in each of at least 50 of the state's 102 counties. Ill. Ann. Stat., c. 46, § 10-2 (1947). The refusal of state officials on authority of this statute to permit Progressive Party candidates on the ballot in the 1948 general election was upheld by the Supreme Court of the United States, three justices dissenting, in *MacDougall v. Green*, 335 U.S. 281, 69 S.Ct. 1, 93 L.Ed. 3 (1948). The court found the provision neither unreasonable nor unprecedented, saying, 335 U.S. at 283:

> "It is allowable State policy to require that candidates for statewide office should have support not limited to a concentrated locality. This is not a unique policy. See New York Laws 1896, c. 909, § 57, now N.Y. Elec. Law § 137 (4); 113 Laws of Ohio 349, Gen. Code § 4785-91 (1929), now Ohio Code Ann. (Supp. 1947 § 4785-91; Mass. Acts, 1943, c. 334, § 2, now Mass. Ann. Laws c. 53, § 6 (1945)."

Occasionally, in the case of legislative candidates, the approach has been taken from the other end of the election process when the legislative body has refused to seat certain candidates. For a discussion of such actions in the New York Legislature and the United States Congress, see Chafee, *op. cit., supra*, 250-82.

c. Control Acts

Perhaps the most comprehensive single scheme of administrative controls over organizations deemed undesirable is contained in the Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U.S.C. §§ 781-798. In conjunction with the Smith Act, *supra*, Section II, this Act gives the federal government a multitude of weapons for use against the Communist Party and communist front organizations. The Act includes a detailed congressional finding of necessity, § 781, for countering the threat of a worldwide communist movement

"whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the the world. . . ."

Section 782 defines terms, including "Communist-action organization" and "Communist-front organization."

Section 786 requires all Communist organizations to register with the attorney general and to file statements giving the names of its officers, full details of the sources of its funds and purposes of expenditures, and, in the case of "Communist-action organizations," a full list of names and addresses of members. It requires the organizations to keep full records.

Section 787 requires members of "Communist-action organizations" to register individually.

Section 788 sets out the duties of the attorney general in administering the Act, including the duty to make the registers available for public inspection, and reporting to the President and Congress.

Sections 791-2 create a Subversive Activities Control Board to determine whether an organization comes within the terms of the Act, and establishes its procedures; Section 793 provides for judicial review.

Section 783 denounces three criminal offenses —conspiracy or attempt to establish a dictatorship, communication of classified information, and receipt of such information. It provides a penalty of up to ten years and $10,000 for violation and a ten-year limitation on prosecution for these offenses. It also provides that holding office or membership in a Communist organization shall not be per se a violation of these or any other criminal provisions and that registration as officers or members shall not be admitted as evidence against them in criminal prosecutions.

Section 784 forbids anybody to conceal membership in a registered organization when seeking, accepting or holding federal or defense jobs, for any member of such an organization to hold a federal job, or for any member of a registered "communist-action organization" to hold a defense job.

Section 785 denies passports to members of registered organizations.

Section 789 provides that when a registered organization disseminates matter by mail, interstate commerce or on the airwaves, the source must be identified as a Communist organization.

Section 790 denies income tax deductions and exemptions for registered organizations.

Section 794 provides penalties for violation of registration provisions and of the prohibitions which go with the registration, and Section 797 provides penalties for violation of security regulations and orders.

Sections 795, 796 and 798 preserve the applicability of the Administrative Procedure Act, other criminal laws and certain individual rights.

This Act was held valid in *Communist Party v. Subversive Activities Control Bd.*, 223 F.2d 531 (D.D.C. 1954), rev'd on other grounds 351 U.S. 115 (1956).

C. Publicity

Perhaps the most dramatic illustration in American history of the way publicity can bring public wrath to bear on an organization came in the 1820s and 1830s. The initial spark seems to have been provided by publication of a purported exposé of Masonry, Morgan, *Freemasonry, by One Who Has Devoted Thirty Years to the Subject* (1826), coupled with the author's disappearance under circumstances leading to suspicions of murder. In the decade following, anti-Masonry took many curious turns on the national scene and provided many a young politican with his first leg up into the limelight. See *Antimasonry*, 2 Encyclopedia Americana 33 (1953); *Anti-Masonic Party*, 2 Encyclopedia Britannica 67 (1952). Among these was Thaddeus Stevens, who later gained his most lasting fame as the avenging spokesman of extreme abolitionists in Congress after the Civil War. A recent summary of Stevens' anti-Masonic activities strikingly illustrates the parallels to be found with other attacks upon organizations discussed herein:

"At the Anti-Masonic party convention in Baltimore in 1831 he became overnight a nationally prominent if not universally admired political figure because of an invective-larded denunciation of secret organizations. Two years later he was elected to the Pennsylvania House of Representatives on the Anti-Masonic ticket, and there he served until 1841, with two years time out between 1835 and 1837.

"As a legislator Thad Stevens introduced all manner of anti-Masonry legislation, described the order as a 'secret, oath-bound, murderous institution' which endangered the continuance of the government. Stevens wanted to exclude Masons from juries and disqualify Masonic judges in cases where Masons were on trial. He won a legislative inquiry into 'the evils of Masonry,' an unavailing effort because the empowering resolution did not provide for contempt proceedings against untalkative witnesses." Carter, *The Angry Scar* 102 (1959).

Although many local lodges in Pennsylvania and New York had to close for a time, Masonry survived the attack and the attacker. A century later the technique of legislative investigation had come of age, and there was little haphazard in its use as a means of bringing target organizations under public scrutiny.

Martin Dies, first chairman of the House Un-American Activities Committee, expressed the basic rationale of exposure as a public weapon against those engaged in activities deemed undesirable:

"I am not in a position to say whether we can legislate effectively in reference to this matter, but I do know that exposure in a democracy of subversive activities is the most effective weapon that we have in our possession. Always we must keep in mind that in any legislative attempt to prevent un-American activities, we might jeopardize fundamental rights far more important than the objective we seek, but when these activities are exposed, when the light of day is brought to bear upon them, we can trust public sentiment in this country to do the rest." 83 *Cong. Rec.* 7570 (1938).

The principle of exposure to public opinion by governmental action may be exercised not only by legislative investigation, as Representative Dies's committee did, but also by registration statutes such as the registration provisions of the Subversive Activities Control Act of 1950, *supra*, Subsection B. The same effect may be gained through judicial proceedings in which the information desired to be made public is ordered produced as an incident to the proceedings, but in these cases exposure is seldom, if ever, given as the justification for disclosure.

1. Investigations

There is, of course, no more direct way a legislative body may proceed against a target organization than by using its own investigative powers to bring the organization's members and officers into the legislative chambers for questioning. At least theoretically, this power is incidental to the lawmaking functions, to be used in obtaining information on which to base legislative decisions. *Watkins v. United States*, 354 U.S. 178, 200, 77 S.Ct. 1173, 1186, 1 L.Ed. 2d 1273, 1291 (1957). As Representative Dies's remarks, *supra*, indicate, however, legislators often frankly state that their real purpose in a given investigation is exposure. Indeed, the committees themselves in their official reports display a similar frankness. See, *e.g.*, quotations from various congressional documents in the court's footnote 32 in the *Watkins* opinion, *supra*, 354 U.S. at 199, 1 L.Ed.2d at 1291, 77 S.Ct. at 1185. But the court said:

"We have no doubt that there is no congressional power to expose for the sake of exposure. . . . Their motives alone would not vitiate an investigation which has been instituted by a House of Congress if that assembly's legislative purpose is being served." 354 U.S. at 200, 1 L.Ed.2d at 1291, 77 S.Ct. at 1185-6.

The power of legislative investigating bodies to put pressure on individuals and organizations is great, particularly if the matters about which witnesses are questioned involve violations of law. Perhaps the most dramatic illustration of this fact was the investigation of organized crime conducted by a committee of the United States Senate in 1950-51.

"1951 witnessed the extraordinary response of the United States public to the televised broadcasts of the hearings held in New York city. Gamblers and political fixers both in and out of public office gave their testimony while millions of their fellow citizens followed the drama with an amused tolerance that quickly changed to bitter revulsion and mounting anger. Hoodlums and political quacks lost their poise in the unseen presence of the television audience and wilted under the heat and glare of studio lighting and the interrogations of committee members and counsel.

"Aside from the clear and open demon-

stration of the vicious alliances prevailing among gamblers and public officers in large cities, it was uncertain whether the senate committee's hearings would have any large or continuing results. Ambassador O'Dwyer returned to Mexico, Willie Minetti was assassinated for talking too freely at the New York hearings and Costello was indicted for perjury and removed himself at least temporarily from the public eye. A flurry of citations for judicial contempt descended upon some of the major and minor characters." *Encyclopaedia Britannica, Inc., Britannica Book of the Year 1952, Crime,* pp. 206-7 (1952).

One court described such proceedings as:

"a triple threat: answer truly and you have given evidence leading to your conviction for a violation of federal law; answer falsely and you will be convicted of perjury; refuse to answer and you will be found guilty of criminal contempt and punished by fine and imprisonment." *Aluppa v. United States,* 201 F.2d 287, 300 (6th Cir. 1952).

Nevertheless, the courts have offered relief, at least in extreme cases, for those hardy enough to take the risks involved in litigation. In *Kilbourn v. Thompson,* 103 U.S. (13 Otto) 168, 26 L.Ed. 377 (1881), the relief granted was the right to bring an action in trespass for false imprisonment against the sergeant-at-arms of the United States House of Representatives. Kilbourn had been convicted by the House itself at its own bar for contempt of the House in refusing to answer questions before an investigating committee and persisting in his refusal before the House itself. After forty-five days in jail he was released by the Supreme Court of the District of Columbia by writ of habeas corpus. Kilbourn then sued the sergeant-at-arms and the members of the committee which brought the charges against him, their pleas under the privileges of the House were held good on Kilbourn's demurrer in the lower court and Kilbourn appealed. The Supreme Court of the United States held that the committee members' plea was good under the United States Constitution, art. I, § 6, providing that "for any speech or debate in either house, they shall not be questioned in any other place." The sergeant-at-arms, however, was held liable to an action in trespass because the order under which he acted was invalid.

The speaker's order was held invalid because the House had no constitutional power to order the investigation, which the Court said concerned a matter which was purely judicial and not subject to remedy by any valid legislation by Congress. The court found no need to decide whether the House might have the power of punishing for contempt in other cases, but its review of the English and American authorities suggested strongly the Court doubted that such a power existed outside of those specific cases in which quasi-judicial powers were vested in the legislature by the Constitution, such as impeachment cases. The court spoke disapprovingly of the early case of *Anderson v. Dunn,* 19 U.S. (6 Wheat.) 204, 5 L.Ed. 242 (1821), in which the court held a warrant of the House of Representatives while in session was a valid justification in an action for false imprisonment against the sergeant-at-arms without consideration of the merits of the House's action. The court in the *Kilbourn* case did not squarely overrule the previous decision, however, noting that in the case before it, unlike *Anderson,* the pleadings disclosed the illegality of the House action. It noted that the *Anderson* opinion did not disclose the basis of the House action, and that only in the reported argument of counsel could it be gathered that the action concerned an attempted bribe of a House member.

However doubtful the court may have been in 1881, or even as late as 1917, see *Marshall v. Gordon,* 243 U.S. 521, 37 S.Ct. 448, 61 L.Ed. 881 (1917), about the extent of the direct contempt powers of the houses of Congress, it has long since been settled that Congress can make contempt of Congress a crime punishable in the courts. *Re Chapman,* 166 U.S. 661, 17 S.Ct. 677, 41 L.Ed. 1154 (1897), upholding conviction under R.S. § 102, now, as amended, 2 U.S.C. § 192 (1952). That the congressional powers are broad in conducting legislative investigations was well established in *Jurney v. MacCracken,* 294 U.S. 125, 55 S.Ct. 375, 79 L.Ed. 802 (1935), *Sinclair v. United States,* 279 U.S. 263, 49 S.Ct. 268, 73 L.Ed. 692 (1929), and *McGrain v. Daugherty,* 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580 (1927).

In the most recent cases, the powers have been assumed, and the court has turned its attention to the problem of determining when the individual witness may assert his constitutional rights as a limitation on the powers. *Flaxer v. United States,* 79 S.Ct. 191, 3 L.Ed.2d

183 (1958); *Sacher v. United States*, 356 U.S. 576, 78 S.Ct. 842, 2 L.Ed.2d 987 (1958); *Watkins v. United States, supra*. The *Watkins* case reversed a conviction for contempt of Congress as invalid under the Due Process Clause of the Fifth Amendment, because the witness had not been advised with sufficient clarity the pertinency of the questions he refused to answer to the subject of the inquiry the committee was authorized to conduct. The court said:

> "The problem attains proportion when viewed from the standpoint of the witness who appears before a congressional committee. He must decide at the time the questions are propounded whether or not to answer. . . . An erroneous determination on his part, even if made in the utmost good faith, does not exculpate him if the court should later rule that the questions were pertinent to the question under inquiry.
>
> "It is obvious that a person compelled to make this choice is entitled to have knowledge of the subject to which the interrogation is deemed pertinent. That knowledge must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense." 354 U.S. at 208-9, 77 S.Ct. at 1190, 1 L.Ed.2d at 1296.

The questions in issue concerned alleged communist affiliations of members of a labor union of which the witness was a member.

In another case decided the same day, the Court invalidated a state contempt conviction for refusal to answer questions of a state legislative committee. *Sweezy v New Hampshire*, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957). Eight justices agreed that the state legislature had power to conduct investigations and compel witnesses to give information, and that it could delegate this power to a committee consisting of the attorney general of the state. Six justices, however, held that the conviction violated the due process clause of the Fourteenth Amendment of the Constitution of the United States. Four justices, speaking for the court, reasoned that the legislature had delegated too broad an authority to the attorney general to determine the scope of the inquiry and to invade individual rights of privacy to gain information the legislature might have no need of. Two justices concurred in the result on the ground that the legislature itself could not have required the petitioner to answer the questions in issue concerning the witness's college lectures and Progressive Party activities—without violating the due process clause, because no sufficient state interest had been shown to justify the admitted invasion of the witness's right of privacy.

Despite the limitations which may be invoked in a court test, however, many of the same factors work against those resisting legislative power which Professor Chafee listed in his discussion of the Boston building code, *supra*, Subsection B. See Griswold, *The Fifth Amendment Today* (1955).

2. Registration

Even when an investigating committee enjoys continuous existence over a long period, as the House Un-American Activities Committee has, the exposure is necessarily intermittent as to any given individual or group. When continuous public scrutiny is desired, legislators may resort to some form of registration statute under which administrative officials maintain up-to-date information on the target groups. The registration provisions of the Subversive Activities Control Act of 1950, *supra*, are an example of such legislation.

It was a statute of this type that brought about the case which has served for thirty years as the leading authority supporting the power of government to require disclosure of membership lists for narrowly limited classes of organizations. New York's anti-Klan law, N.Y. Laws 1923, c. 664, as amended, N.Y. Civ. Rights Law § 53 (McKinney 1948), provided for registration and filing of detailed information, including membership lists, by any association of 20 or more members which "requires an oath as a prerequisite or condition of membership, other than a labor union or a benevolent orders law." It provided penalties against the organization and also against those retaining membership knowing the statute had not been complied with. This law was clearly designed to apply only to the Ku Klux Klan. See Robison, *Protection of Associations from Compulsory Disclosure of Membership*, 58 Colum. L. Rev. 614, 642-3 (1958). After a few college fraternities registered under it, the law was amended, N.Y. Laws 1925, Ch. 521, to restrict the definition still more closely to the Klan. This law was contested in habeas corpus proceedings by George W.

Bryant, who had been arrested for being a member of the Buffalo Klan with knowledge that it had not complied with the Act. Bryant's petition for the writ was dismissed in the New York Supreme Court at special term. The Appellate Division affirmed, *People ex rel. Bryant v. Zimmerman*, 213 App. Div. 414, 210 N.Y. Supp. 269 (4th Dept. 1925), *aff'd* 241 N.Y. 405, 150 N.E. 497 (1926), *aff'd* 278 U.S. 63, 49 S.Ct. 61, 71 L.Ed. 184 (1928). Only one dissenting vote on the merits was cast in the three appeals, and that in the appellate division. See Annot., 62 A.L.R. 798 (1929). All of the appellate courts assumed the law was designed to curb this one organization, and all of them upheld the legislature's classification as a reasonable exercise of the police power of the state.

The Court of Appeals said the legislature "cannot legitimately vent its permanent or passing wrath on a single society, unless such society is known or shown to be in a class by itself." 150 N.E. at 499.

The Supreme Court of the United States quoted passages from the opinions of the courts below which took judicial notice of facts about the Ku Klux Klan as a matter of "common knowledge"—that "it functions largely at night, its members disguised by hoods and gowns and doing things calculated to strike terror into the minds of the people," and that it "exercises activities tending to the prejudice and intimidation of sundry classes of our citizens," 278 U.S. at 75, 49 S.Ct. at 66, 73 L.Ed. at 190-91. The court also added its own bit of judicial notice:

> "We assume that the legislature had before it such information as was readily available, including the published report of a hearing before a committee of the House of Representatives of the 57th Congress relating to the formation, purposes and activities of the Ku Klux Klan." *Id.* at 76, 49 S.Ct. at 66, 73 L.Ed. at 191.

The court noted that this report showed that the Klan

> "was conducting a crusade against Catholics, Jews and Negroes, and stimulating hurtful religious and race prejudices; that it was striving for political power and assuming a sort of guardianship over the administration of local, state and national affairs; and that at times it was taking into its own hands the punishment of what some of its members conceived to be crimes.
>
> "We think it plain that the action of the courts below in holding that there was a real and substantial basis for the distinction made between the two sets of associations or orders was right and should not be disturbed." *Id.* at 76-7, 49 S.Ct. at 66, 73 L.Ed. at 191.

These observations related to the court's consideration of contentions that the law denied Bryant the equal protection of the laws by excluding other oath-bound societies. The court disposed of contentions under the privileges and immunities and due process clauses rather summarily. It held the right to be a member of an oath-bound society was not an incident of United States citizenship protected by the privileges and immunities clause. Of the due process clause, the court said:

> "The relator's contention under the due process clause is that the statute deprives him of liberty in that it prevents him from exercising his right of membership in the association. But his liberty in this regard, like most other personal rights, must yield to the rightful exertion of the police power. There can be no doubt that under that power the state may prescribe and apply to associations having an oath-bound membership any reasonable regulation calculated to confine their purposes and activities within limits which are consistent with the rights of others and the public welfare. The requirement . . . that each association shall file with the secretary of state a sworn copy of its constitution, oath of membership, etc., with a list of members and officers, is such a regulation. It proceeds on the twofold theory that the state within whose territory and under whose protection the association exists is entitled to be informed of its nature and purpose, of whom it is composed and by whom its activities are conducted, and that requiring this information to be supplied for the public files will operate as an effective or substantial deterrent from the violations of public and private right to which the association might be tempted if such a disclosure were not required. The requirement is not arbitrary or oppressive, but reasonable and likely to be of real effect. Of course, power to require the disclosure includes authority to prevent individual members of an association which has

> failed to comply from attending meetings or retaining membership with knowledge of its default." *Id.* at 72-3, 49 S.Ct. at 73, 73 L.Ed. at 189.

Some writers have suggested that the court ought to overrule this case. See *e.g.*, Robison, *Protection of Associations from Compulsory Disclosure of Membership*, 58 Colum. L. Rev. 614, 647 (1958). Others have criticized it while pointing out the factual and legal bases on which they thought it could be distinguished. See, *e.g.*, McKay, *The Repression of Civil Rights as an Aftermath of the School Segregation Cases*, 4 How. L.J. 9, 26 (1958). When the issue came up in *NAACP v. Alabama, supra*, the Supreme Court of the United States chose to distinguish *Bryant*, saying:

> "that case involved markedly different considerations in terms of the interest of the State in obtaining disclosure. . . . The decision was based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence, which the Court assumed was before the state legislature when it enacted the statute and of which the Court itself took judicial notice. Furthermore, the situation before us is significantly different from that in Bryant, because the organization there had made no effort to comply with any of the requirements of New York's statute but rather had refused to furnish the state with *any* information as to its local activities." 357 U.S. at 465-6, 78 S.Ct. at 1173, 2 L.Ed.2d at 1501-2, 3 Race Rel. L. Rep. at 617-18 (1958). (Emphasis by the Court.)

III Attack on the NAACP

State governments throughout the South have drawn on the ingenuity of the past and added their own devices and new combinations of old ones in pressing their counter-attack against the NAACP and other organizations favoring integration of the races. Following the pattern of their predecessors, they sought: (A) to broaden the reach of the criminal law to include activities of the target organizations where possible, (B) to use both new and existing tax and regulatory powers against the target organizations, and (C) to force disclosure of the activities and membership of the organizations.

A. Criminal Law Approach

1. Champerty, Maintenance and Barratry

The main thrust of directly prohibitory legislation so far has been aimed at the NAACP's activities in litigating civil rights issues. This has largely taken the form of a multitude of statutes redefining the common law offenses of barratry, champerty and maintenance. These statutes have been considered in detail in a separate study. See *Inciting Litigation*, 3 Race Rel. L. Rep. 1257 (1958).

2. Breach of Peace and Disorderly Conduct

Mississippi has gone further by prohibiting advocacy of disobedience to law or nonconformance to custom and by defining such advocacy in terms of inciting to riot, breach of the peace and public disturbance. The law, (House Bill No. 119, 1956) 1 Race Rel. L. Rep. 449 (1956), provides:

> "It shall be unlawful for any person or persons within the territorial limits of the State of Mississippi or the jurisdiction thereof to incite a riot, or breach of the peace, or public disturbance, or disorderly assembly, by soliciting, or advocating, or urging, or encouraging disobedience to any law of the State of Mississippi, and nonconformance with the established traditions, customs, and usages of the State of Mississippi." § 1

The maximum penalty was set at $1,000 fine and six months imprisonment.

Another Mississippi bill, which was vetoed by the governor, would have provided criminal and civil penalties for any person who deprives or attempts or conspires to deprive another of his state civil rights "under color of any law, statute, ordinance, regulation or custom of any other state or of the United States." Miss. House Bill 30, 1956, 1 Race Rel. L. Rep. 448 (1956).

The 1958 special session of the Arkansas legislature, held in the midst of the school integration crisis in Little Rock, passed an Act de-

fining and prohibiting disorderly conduct on school property, in school cafeterias and in business houses. Ark. Act. No. 17, 1958, 3 Race Rel. L. Rep. 1052. Except for its specific reference to school property and cafeterias, considered in connection with the general purposes for which the legislature was called into special session, the effective section of the bill might not be considered within the scope of this article. It provides that it shall be a misdemeanor to enter such property and while there to

> "create a disturbance, or a breach of the peace, in any way whatsoever, including, but not restricted to, loud and offensive talk, the making of threats or attempting to intimidate, or any conduct which causes a disturbance or breach of the peace or threatened breach of the peace." *Id.*, § 1.

The emergency enactment clause, however, is more indicative:

> "It has been found and is declared by the General Assembly of the State of Arkansas that many persons have entered upon school premises and other public places of business in order to create disturbances or breaches of the peace, and that such disturbances and breaches of the peace directly affect the orderly administration of the public schools." *Id.*, § 2.

B. Administration and Regulation

1. Pre-existing Powers

a. Taxation

No power exercised by the executive branches of either the state or federal government is more liberally construed in favor of those exercising the power than the power of taxation. Nothing illustrates this point better than the current trend of decisions of the Supreme Court of the United States narrowing the application of the federal government's jealously guarded immunity from state taxation. *United States v. Detroit*, 355 U.S. 466, 495, 505, 78 S.Ct. 474, 486, 2 L.Ed. 2d 424, 460 (1958). It is not surprising, then, that one of the most successful and expeditious efforts to gain access to the records of the NAACP was made under a tax statute. This action was instituted by the revenue commissioner of the State of Georgia by demanding the production of certain books and records of the Georgia NAACP for the purpose of determining tax liability. The demand was refused and a court order was obtained for their production. This, too, was refused. Civil and criminal contempt prosecutions followed. *Williams v. NAACP*, 2 Race Rel. L. Rep. 181 (Ga. Super. 1956). John H. Calhoun, president of the local chapter, was given a suspended sentence for criminal contempt and jailed for civil contempt until he produced the records. After several hours in jail he accompanied a deputy sheriff to NAACP headquarters and allowed investigators to seize and list all documents. He then was freed. The NAACP was fined $25,000 for criminal contempt, with provision for partial remission if books and records should be produced, including those which the NAACP said were required to be kept in New York. The NAACP offered to allow Georgia officials to examine its records in New York, and two Georgia officials spent several days inspecting them there in May, 1957.

The following month, the NAACP presented its bill of exceptions to the trial judge in preparation for an appeal, but the trial judge insisted upon changes the NAACP was unwilling to make. The NAACP petitioned the court of appeal for a writ of mandamus to require him to sign the bill as submitted, but the writ was denied. *NAACP v. Pye*, 96 Ga. App. 685, 101 S.E.2d 609, 3 Race Rel. L. Rep. 312 (1957). Subsequently the NAACP appealed by writ of error, but the court of appeal found that the bill of exceptions had not been changed in accordance with previous ruling. It dismissed the writ for lack of jurisdiction because the bill of exceptions was certified conditionally. *NAACP v. Williams*, 104 S.E.2d 923, 3 Race Rel. L. Rep. 980 (Ga. App. 1958).

b. Registration of Foreign Corporations

At about the same time the Georgia officials were proceeding under the tax powers, the state attorney general of Alabama launched analogous proceedings under the foreign corporation laws which were destined to fail before the Supreme Court of the United States. The attorney general obtained a temporary injunction restraining the NAACP from doing business in the state. *Alabama ex rel. Patterson v. NAACP*, 1 Race Rel. L. Rep. 707 (Ala. Cir. Ct. 1956). The injunction also forbade the organization from taking any steps to comply with the foreign corporation law. Later the state asked an order

requiring production of NAACP records, including a membership list. The order was substantially granted over objection. The association declined to produce the records and was fined $10,000 for civil contempt, with provision for reduction if it produced the records within five days, and for an increase to $100,000 if it did not do so. *Alabama ex rel. Patterson v. NAACP*, 1 Race Rel. L. Rep. 917 (Ala. Cir. Ct. 1956). On the fifth day the association offered to comply with the foreign corporation law and to produce most of the demanded records—but not the membership lists—and sought a stay of execution pending appellate review. The stay was denied and the fine was raised to $100,000. The Supreme Court of Alabama likewise denied a motion for stay of execution. 265 Ala. 356, 91 So.2d 220 (1956). A writ of certiorari to review the original contempt judgment was denied on grounds the averments of the petition were insufficient. *Ex Parte NAACP*, 265 Ala. 699, 91 So. 2d 221, 1 Race Rel. L. Rep. 919 (1956). A second petition for a writ of certiorari to review the $100,000 judgment also was denied. *Ex Parte NAACP*, 265 Ala. 349, 91 So.2d 214, 2 Race Rel. L. Rep. 177 (1956). In a per curiam opinion the Alabama Supreme Court held that the petition for writ of certiorari was the wrong procedure for reviewing the merits of the court's order to produce the records and that it presented only the contempt judgment for review. Nevertheless, the court discussed the merits of the order and found:

> "The petitioner argues that its belated offer to produce included everything except items number 2 and 8 as set out in its brief, and that it was not required to produce these. Items 2 and 8 are:
>
> "'2. All lists, documents, books, and papers, addresses and dues paid of all present members in the State of Alabama of the National Association for the Advancement of Colored People, Incorporated.
>
> * * *
>
> "'8. All lists, books, papers showing the names and addresses of all officers, agents, servants and employees in the State of Alabama of the National Association for the Advancement of Colored People, Inc.'
>
> "Assuming that the petitioner did offer to bring in for inspection by the State everthing except the documents listed in items 2 and 8, could the court require the petitioner to disclose this information? We think so."
>
> "It is clear, therefore, that the circuit court, in equity, had authority to order the petitioner to disclose names, addresses and dues paid by petitioner's members, officers, agents, and employees and that the petitioner could be held in contempt of court for noncompliance with the court's order to produce." 91 So.2d at 220, 2 Race Rel. L. Rep. at 181.

The Supreme Court of the United States granted certiorari, reversed and remanded. *NAACP v. Alabama ex rel. Patterson, supra*, Part I. In a unanimous opinion by Justice Harlan, the court said:

> "We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment. And we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have." 357 U.S. at 466, 78 S.Ct. at 1174, 2 L.Ed.2d at 1502, 3 Race Rel. L. Rep. at 618.

In reaching this conclusion, the court had to solve two knotty legal problems. First it was faced with a jurisdictional challenge grounded on the contention that the Alabama Supreme Court's decision was based on a non-federal procedural ground not subject to review before the Supreme Court of the United States. It disposed of this obstacle by finding that previous decisions of the Alabama court justified the NAACP in relying on the procedure it followed. 357 U.S. at 458, 78 S.Ct. at 1169-70, 2 L.Ed.2d at 1497, 3 Race Rel. L. Rep. at 614. Next was the problem of the NAACP's standing to assert the constitutional rights of its members under the doctrine of *Tileston v. Ullman*, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943). On this point the court ruled:

> "If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this

right is properly assertable by the Association. To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion. Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical. The Association, which provides in its constitution that '[a]ny person who is in accordance with [its] principles and policies . . .' may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views. The reasonable likelihood that the Association itself through diminished financial support and membership may be adversely affected if production is compelled is a further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members. Cf. Pierce v. Society of Sisters, 268 U.S. 510, 534-536," 45 S.Ct. 571, 69 L.Ed. 1070, 1078, 39 A.L.R. 468. 357 U.S. at 459-60, 78 S.Ct. at 1170, 2 L.Ed.2d at 1498, 3 Race Rel. L. Rep. at 615.

The Supreme Court concluded:

"Accordingly, the judgment of civil contempt and the $100,000 fine which resulted from petitioner's refusal to comply with the production order in this respect must fall.

". . .

"For the reasons stated, the judgment of the Supreme Court of Alabama must be reversed and the case remanded for proceedings not inconsistent with this opinion." 357 U.S. at 466, 78 S.Ct. at 1174, 2 L.Ed. at 1502, 3 Race Rel. L. Rep. at 618.

Upon remand, the Supreme Court of Alabama found it would not be inconsistent with the higher court's opinion to reaffirm the trial court's judgment. *Ex Parte: NAACP*. The Alabama court said:

"The decision of the Federal Supreme Court seems to have proceeded upon a hearing there, upon consideration of allegations there made, and upon showings or evidentiary matters and contentions, much of which were never before this Court. It thereupon reversed the judgment of this Court and remanded the case for further proceedings 'not inconsistent with' the opinion of that Court.

". . .

"Petitioner contends that it was held in contempt for refusal to produce its membership lists. As to the petitioner's right of said refusal, the Supreme Court of the United States, as stated, has settled that point, and no further discussion would be proper. However, petitioner's contention as to this sole reason it was held in contempt is not borne out by the record and the Supreme Court of the United States in its opinion, supra, seems to have rested decision on this mistaken premise. . . .

". . .

". . . It is clear the petitioner is still in contempt for its failure to produce the other 'certain books, papers and documents' described in the lower court's order, thereby necessitating another affirmance of the judgment."

Arkansas proceeded even more simply by means of a gubernatorial proclamation apparently based on both the tax power and the power to exclude foreign corporations. Upon certification from the commissioner of revenue that 52 foreign corporations, including the NAACP, were delinquent in payment of franchise taxes, the governor proclaimed all of them "to have forfeited all rights to do business in this State and to be dissolved or withdrawn as the case may be." Proclamation of Gov. Orval E. Faubus, Feb. 12, 1958, 3 Race Rel. L. Rep. 361.

c. Regulation of Schools

Two contrasting minor examples of use of administrative authority to reinforce official views on the racial question occurred within four months in 1957. The Trustees and Administration of the University of Massachusetts issued a policy statement on January 12, 1957, forbidding establishment or continuation of fraternities or sororities having rules "which forbid the pledging, initiation, or free association of students on the basis of race, creed, or color." 2 Race Rel. L. Rep. 510 (1957). The Georgia State Board of Education, on the other hand, adopted a resolution on April 22, 1957, requiring clubs and organizations in the public schools to pledge, as a condition of retaining status as recognized school activities, "not to plan or allow any racially mixed conferences, programs

or meetings involving the public school students of Georgia." 2 Race Rel. L. Rep. 715 (1957).

2. New Powers

South Carolina's legislature broke the widespread taboo against identifying a legislative target by name in 1956. Act 714, March 17, 1956, 1 Race Rel. L. Rep. 751. This Act prohibited the hiring of members of the NAACP by any agency of the state and required that any members already on the public payroll be dismissed. Seventeen Negro public school teachers challenged the law in federal courts, but a three-judge district court ruled that they must seek relief through state agencies and courts. *Bryan v. Austin*, 148 F.Supp. 563, 2 Race Rel. L. Rep. 378 (1957). See, on exhaustion of administrative remedies, 2 Race Rel. L. Rep. 561 (1957). The *Bryan* decision was appealed to the Supreme Court of the United States, but the state legislature repealed the Act while the appeal was pending. Act 223, April 24, 1957, 2 Race Rel. L. Rep. 852. The Supreme Court accordingly vacated the judgment as moot and remanded the case for possible further action by the plaintiffs either to safeguard any rights which may have accrued under the old Act or under the repealing statute. *Bryan v. Austin*, 354 U.S. 933, 77 S.Ct. 1396, 1 L.Ed.2d 1527, 2 Race Rel. L. Rep. 777 (1957). The repealing statute substituted provisions aimed at disclosure of prospective employees' affiliations with any organization. It will be considered with other disclosure statutes, Subsection C, *infra*.

During the original statute's short life, however, a new school year began, and the indications are that it may well have provided the leverage for removal of some NAACP members or sympathizers from the state payroll. It is reported that in one county 24 teachers who refused to answer a questionnaire about their affiliations were not rehired for the new school year. See *American Jewish Congress, supra*, at 22.

Louisiana's legislature moved as directly and precisely against the NAACP in similar legislation without actually naming the organization. La. Acts 248, 249, 250, 252, July 8, 1956, 1 Race Rel. L. Rep. 943, 941, 944, 942 (1956). These Acts provide for removal of teachers and other school employes who are members of or contribute "to any group, organization, movement or corporation that is by law or injunction prohibited from operating in the State of Louisiana." At the time the NAACP was under an injunction prohibiting it from operating in the state because of failure to comply with registration statutes. *Louisiana ex rel. LeBlanc v. Lewis*, 1 Race Rel. L. Rep. 571 (La. Dist. Ct. 1956).

The September, 1958, special session of the Arkansas General Assembly enacted a statute giving the state attorney general power to obtain an ex parte court order allowing him and a sheriff or deputy sheriff to visit the offices and inspect and make copies of the records of any organization he has reason to believe has evaded taxes. Ark. Act. No. 13, 1958, 3 Race Rel. L. Rep. 1056. Although the section spelling out the power granted refers only to tax evasion (§ 2), the section declaring the intent of the legislature (§ 1) declares that the powers are granted

> "in view of the fact that certain organizations, whether incorporated or not, have heretofore interfered with the peace and proper administration of the public schools and institutions of the State of Arkansas. . ."

Anyone refusing access to records and files under such an order is made subject to summary contempt of court citation and also prosecution for a misdemeanor, with a maximum penalty of six months imprisonment and $500 fine.

C. Publicity

The issue of the states' power to require disclosure of membership and financial information has been a prominent feature of most of the acts and proceedings catalogued in Subsections A and B, *supra*. In this subsection, disclosure is the primary feature.

1. Investigations

South Carolina probably was the first state to authorize a study of the segregation problem in the light of the early college desegregation decisions culminating with *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950). The South Carolina legislature created a twelve-member commission in 1951 to study school segregation, to survey all phases of segregation and to coordinate activities with other states. The commission was continued and the scope of its activity was broadened by the 1955 legislature. The first indication in the statutes of a direct legislative attack on the NAACP as an organization in South Carolina,

however, came in 1956. S.C. Act 920, 1956, 1 Race Rel. L. Rep. 600. This statute ordered "an investigation of the activities of the National Association for the Advancement of Colored People among the faculty and students of the South Carolina State College." The committee, however, was not strictly a legislative committee, but rather was made up of three members from the state at large and three from each house of the legislature. It was given subpoena powers. The investigation of the NAACP was ordered as a result of student and faculty participation in a white-Negro boycott and counter-boycott in Orangeburg. According to the report by the American Jewish Congress:

> "When the legislative investigating committee notified the College that it was ready to begin its probe, it was assured by the College president that there was nothing left to investigate. The committee visited the campus, conducted a one-day hearing and went home." *American Jewish Congress, supra,* at 24.

The Congress reported that one student had been dismissed, 15 had not been allowed to re-enroll in September, five faculty members had been dropped and a number of others had resigned.

Louisiana created a joint legislative committee in 1954, La. H. Con. Res. No. 27, 1954, which was renewed two years later. H. Con. Res. No. 9, 1956, 1 Race Rel. L. Rep. 755. The resolution renewing the committee declared the purpose to be "carrying on and conducting the fight to maintain segregation of the races in all phases of our life in accordance with the customs, traditions, and laws of our state." The committee was directed to "make studies, provide information, draft legislation, and in connection with any of the foregoing conduct investigations, hearings and take any and all actions that might be necessary or incidental to carrying out the purposes set forth." The committee has aired considerable testimony unfavorable to the NAACP but direct disclosure efforts came through other channels. In one instance, the committee sought information by questionnaire from sixty-three members of the Louisiana State University faculty who had signed an American Civil Liberties Union petition seeking defeat of proposals for closing of any public schools that might be integrated. The questions sought to find out how many actually signed the petition, how many knew what they were signing and what organization had initiated it, whether professors belonged to any of six organizations, including the NAACP, and their attitude toward integration. Five reported they were members of the ACLU and its Louisiana branch, but none said he was a member of any of the other organizations and none gave an unqualified yes to the question whether he advocated integration in teaching his classes. The committee's published tabulation of the answers is set out at 3 Race Rel. L. Rep. 781 (1958).

Virginia's legislature, as part of its comprehensive plan of "massive resistance" to integration, provided for two simultaneous investigations. It set up one legislative committee to oversee the enforcement of acts relating to champerty, maintenance, barratry, running and capping and other offenses concerning litigation and the administration of justice. Ch. 34, 1956 Extra Session Acts of Virginia, 2 Race Rel. L. Rep. 1020. Another Act set up a committee to investigate the activities of organizations "which seek to influence, encourage or promote litigation relating to racial activities." Ch. 37, 1956 Extra Session Acts of Virginia, 2 Race Rel. L. Rep. 1023.

The Joint Committee on Offenses Against the Administration of Justice, known as the "Boatwright Committee," and the Committee on Law Reform and Racial Activities, known as the "Thomson Committee," pursued their investigations simultaneously during 1957. Both gathered a great deal of information about the NAACP and its affiliates as well as about a number of pro-segregation organizations. The Boatwright Committee reported on one case of alleged solicitation of lawsuits having nothing to do with the racial question. See the committee's report, Nov. 13, 1957, 3 Race Rel. L. Rep. 98.

The committees obtained a number of subpoenas from various courts throughout the state. Some were complied with, some were contested in the courts. The NAACP brought its main contest against two subpoenas issued ex parte by the Hustings Court at Richmond on the application of the Boatwright Committee. It filed a motion to quash in the Hustings Court, which denied the motion after a hearing. On writ of error, the Supreme Court of Appeals of Virginia affirmed. *NAACP v. Committee on Offenses Against the Administration of Justice,* 199 Va.

665, 101 S.E.2d 631, 3 Race Rel. L. Rep. 260 (1958). The court summarized the issues on appeal in these words:

> "The assignments of error raise these questions: (1) Is the Hustings Court of the city of Richmond authorized to direct the issuance of the subpoenas; (2) Does the Act authorize the issuance of the subpoenas without notice, and if so, does it violate the constitutional requirement of due process; (3) Does the disclosure of the information sought by the subpoenas violate any constitutional rights of the appellants; (4) Does the Act creating the Committee and prescribing its functions violate § 39 of the State Constitution; and (5) Did the lower court abuse its sound judicial discretion in directing the issuance of the subpoenas?" 101 S.E.2d at 633, 3 Race Rel. L. Rep. at 261.

The NAACP complied with all the demands of the subpoenas except for the production of the list of its 20,000 Virginia members and its voluntary workers and associates and some other information the court found it needless to discuss. The issues were thus narrowly drawn in relation to the committee's demand for membership lists. The court found the Hustings Court was authorized to issue the subpoenas ex parte and that this procedure was not a denial of due process since the NAACP had an opportunity for hearing before final determination of the matter. The documents had not been produced pending the outcome of the proceedings on the motion to quash. It also ruled that the "plenary power to oversee" granted the committee was not an executive power granted in violation of Section 39 of the Constitution of Virginia, which provides for separation of powers. The court also ruled that the Hustings Court did not abuse its sound judicial discretion in failing to inquire into the motives of the legislature for enacting laws the NAACP called archaic, obsolete and unnecessary.

The court's principal attention, however, was focused on the appellants' contention that the disclosure of the membership lists would violate their constitutional rights. It discussed (a) the inherent power of legislatures to conduct investigations, and (b) constitutional restraints on the power under the due process and privileges and immunities clauses of the Fourteenth Amendment to the Constitution of the United States and under Section 10 of the Constitution of Virginia prohibiting unreasonable searches and seizures.

The court cited two New York cases in support of its views on the inherent power of the legislature and the limited nature of the court's inquiry on a motion to quash a subpoena. *In Re Joint Legislative Committee to Investigate the Education System of New York*, 285 N.Y. 1, 32 N.E.2d 769 (1941); *In re Edge Ho Holding Corp.*, 256 N.Y. 374, 176 N.E. 537 (1931). Referring to the *Joint Legislative Committee* case, the Virginia court said:

> "Because of the similarity of the issues presented, what was said in that case is particularly interesting in the case now before us. In refusing to vacate the subpoena the court pointed out that, 'The law-making power given to the Legislature authorizes it, by inquiry, to ascertain facts which affect public welfare and the affairs of government. Such power of inquiry, with process to enforce it, is an essential auxiliary to the legislative function. . . .'
>
> "Continuing, it said: 'In the present proceeding, as we have seen, we must assume that the legislative inquiry was well intended. If a subpoena is to be quashed in advance of a committee hearing, upon a forecast of the testimony sought and arguments as to its probable effect, the purpose of the inquiry may be thwarted. We cannot say as a matter of law, upon the record at hand, that the subpoena now challenged would be futile as an aid to the legislative inquiry instituted by the Joint Resolution. It is only when futility of such process is inevitable or obvious that there must be "a halt upon the threshold" of the inquiry.' (Citing In re Edge Ho Holding Corp., supra) 32 N.E.2d, at page 771." 101 S.E.2d at 638, 3 Race Rel. L. Rep. at 265.

The quoted New York case affirmed an order refusing to vacate a subpoena duces tecum requiring the production of a list of members of a teachers' union before a legislative committee.

The Virginia court mentioned the problem of the right of the NAACP to claim the protection of the Fourteenth Amendment, but passed over the question and held that the right of privacy protected by the Constitution is subject to the reasonable exercise of the state's police power, citing *New York ex rel. Bryant v. Zimmerman, supra*, and added:

"The investigation by a legislative committee within the scope of its prescribed duties is universally recognized as a reasonable exercise of such police power. Consequently, the production of papers material to such an inquiry may not be refused merely because they are private." 101 S.E. 2d at 639, 3 Race Rel. L. Rep. at 266.

The court held that no privileges or immunities peculiar to United States citizens were involved in the case, citing the *Bryan* case again, and that the requirement to produce relevant records did not constitute an unreasonable search and seizure.

On certiorari, the Supreme Court of the United States, upon being informed that the cause had become moot, vacated the judgment and remanded the case to the Supreme Court of Appeals of Virginia "for such further proceedings as that court may deem appropriate." 79 S.Ct. 24, 3 L.Ed.2d 46, 3 Race Rel. L. Rep. 868 (1958). While the case was pending, the Boatwright Committee had gone out of existence.

The Thomson Committee also resorted to the courts at one point to require a recalcitrant witness to answer questions. Committee Report, 2 Race Rel. L. Rep. 1159, 1166 (1957). This action turned into an involved proceeding which is still in litigation. The witness, David H. Scull, Annandale, Va., appeared with a District of Columbia lawyer, challenged the constitutionality of the Act creating the committee and the jurisdiction of the committee, and refused to answer questions beyond the formal ones establishing his identity. The committee obtained a rule to show cause from the Circuit Court of Arlington County, and Scull appeared, this time represented by Joseph L. Rauh Jr., vice chairman of the Americans for Democratic Action, and two other lawyers. The case was argued chiefly on the basis of the Fourteenth Amendment of the Constitution of the United States. After the hearing, the court ordered Scull to testify and refused to stay the execution of the order pending an appeal. Subsequent appeals for a stay were denied successively by the Supreme Court of Appeals of Virginia and the Chief Justice of the United States. Scull then appeared before the committee again and again refused to answer questions. He was then cited for contempt. The Arlington Circuit Court, after hearing, fined him fifty dollars and sentenced him to ten days in jail, but stayed the sentence pending appeal. See December, 1957, report from Virginia, files, Southern Education Reporting Service. In January, 1958, the Supreme Court of Appeals of Virginia declined to review the case. See February, 1958, report from Virginia, files, Southern Education Reporting Service. Scull then obtained a writ of certiorari from the United States Supreme Court, where it was still pending in January, 1959. *Scull v. Virginia ex rel. Committee on Law Reform and Racial Activities*, 357 U.S. 903, 78 S.Ct. 1148, 2 L.Ed.2d 1154 (1958).

Georgia's attorney general recommended in 1956 that the General Assembly create a joint legislative committee to investigate "corporations, associations, organizations and other groups which seek to influence public opinion or encourage and promote litigation," and to recommend legislation to regulate and govern them. In his covering letter he specifically mentioned the NAACP. 1 Race Rel. L. Rep. 956 (1956). The 1957 legislature, however, contented itself with augmenting the previous resolution of 1953 creating the Georgia Commission on Education and authorizing it to continue its work of investigation and publication so that

"the people of the entire nation should be made aware of these problems and the Georgia and Southern viewpoint relating thereto, in order that the distorted views which have been presented by certain segments of the Northern press and other periodicals may be combatted." Ga. House Resolutions Nos. 8 and 11 (Res. Act Nos. 16 and 15), 1957, 2 Race Rel. L. Rep. 454, 455.

A year later a joint legislative committee was created to investigate

"the activities of all persons, corporations, organizations, associations and other like groups which seek to institute, promote, finance, bring about or in anywise encourage litigation in this State. The Committee shall conduct its investigation so as to collect evidence and information which shall be necessary or useful in the drafting and preparation of legislation dealing with barratry, champerty, maintenance, the unauthorized practice of law, and other similar offenses." Ga. Res. Act 18, 1958, 3 Race Rel. L. Rep. 359.

The committee was empowered to issue subpoenas and to enforce its process through the courts, but it also was ordered to advise all

witnesses of their rights. The resolution provided: "No witness shall be compelled to incriminate himself, nor shall any witness be subjected to abuse while being examined."

The Florida legislature, in a special session in the summer of 1956, adopted as part of an extensive pro-segregation program, an Act creating an interim legislative committee to investigate both pro-segregation and anti-segregation activities. Fla. Acts, Ch. 31498, 1956. It reported to the regular 1957 session, which created another interim committee to continue the work. Fla. Acts, Ch. 57-125 (S.B. 347) 1957, 3 Race Rel. L. Rep. 784. In adopting the new Act, the legislature declared that the

> "committee's records and report disclose a great abuse of the judicial process of the courts in Florida, as well as certain activities on the part of various organizations and individuals which constitute violence or the threat thereof, or violations of the laws of this state . . . . [T]here is now available to said committee evidence and sources of evidence disclosing that the Communist party and other subversive organizations are seeking to agitate and engender ill-will between the races of this and other states." 3 Race Rel. L. Rep. 784.

The committee was armed with the subpoena power and directed to report to the 1959 session of the legislature.

The committee's power was first contested February 18, 1958, by motion to quash a subpoena *duces tecum* requiring Edward T. Graham to produce all books, records, and lists of membership pertaining to the NAACP and the Florida Council for Human Relations. The circuit court denied the motion February 25. The following two days, the committee held hearings at which Graham and several other witnesses challenged the committee's powers on a variety of grounds and refused to produce membership lists and other records or to answer certain questions. The committee then petitioned for circuit court orders requiring the witnesses to produce the records and answer the questions or face punishment for contempt of court. The orders were issued as requested except as to questions about Communist Party affiliation against which the witnesses invoked their privilege against self-incrimination. Seven witnesses, including Graham, appealed from these orders.

Meanwhile, Graham had previously appealed from the circuit court's denial of his motion to quash the subpoena *duces tecum*. The Supreme Court of Florida affirmed. *In re: Petition of Graham*, 104 So.2d 16, 3 Race Rel. L. Rep. 724 (Fla. 1958). The court held the issue was raised prematurely and did not reach the constitutional question, although it indicated its belief that there was no constitutional right to withhold membership lists. The case was decided two weeks before the decision in *NAACP v. Alabama ex rel. Patterson, supra*, and a rehearing was denied two weeks after the *Alabama* decision, but there was no indication that the court considered the views of the Supreme Court of the United States on the freedom of association in denying the rehearing.

The seven witnesses, on their appeals from the orders to answer, presented a diversity of issues to the Supreme Court of Florida. Graham renewed his objections to production of membership lists, contending the court's decision on his earlier appeal had been overruled in effect by the United States Supreme Court in the *Alabama* case. Other witnesses contested similar orders, also invoking the right of association announced in the *Alabama* case. In addition, one or more of the witnesses presented issues of the validity of the statutes creating the committee, the power of the legislature to conduct such inquiries, whether the federal Smith Act had pre-empted the field of subversive legislation, the self-incrimination privilege, whether the committee was prejudiced, and the right of an organization's attorney to refuse to divulge information which the client could not withhold.

The court reaffirmed its position that the statutes creating the committee were constitutional, that the state's statutes denouncing subversion of the state government did not invade the field of federal pre-emption, and that the legislature had inherent power to conduct such investigations. On the latter point, the court noted that even if the legislature could not have enacted positive law on the matters investigated, it still could investigate in pursuance of its power to propose amendments to the Constitution of the United States in accordance with Article V of that document. It found no factual support for the charge of prejudice against the committee, and ruled rather impatiently against the attorney's contentions.

Upon the question of freedom of association

as affected by the orders to produce membership lists, the court reaffirmed its prior decision in the *Graham* case that the subpoena *duces tecum* was validly issued, and held that the lists must be brought to the hearing as ordered. The court held, however, that the committee could not require that they be given to the committee *in toto*. The court held:

> "Such witnesses may be required to refer to such records and answer under oath any inquiry regarding any individual whose association with NAACP is shown to be pertinent to the inquiry in accord with the rules announced in this opinion."

The court laid down its rules as to pertinency by using one question as an illustration. This question, asked of one witness, was, "Do you know Arlington Sands?" The court held this question was pertinent because the committee counsel had supplemented it by explaining that a previous witness had testified that Sands was a suspected member of the Communist Party. Similar questions without supplemental explanation were held to be lacking in pertinency under the court's interpretation of the *Watkins* case, *supra*, Section II.

Mississippi's legislature, which already had a standing General Investigating Committee, created a State Sovereignty Commission in 1956. Miss. H.B. 880, 1956, 1 Race Rel. L. Rep. 592. This commission was given wide powers of subpoena, the right to invoke the aid of the chancery courts and the power to inspect books and records touching and concerning the matters it was authorized to investigate. It was instructed

> "to do and perform any and all acts and things deemed necessary and proper to protect the sovereignty of the State of Mississippi, and her sister states, from encroachment thereon by the Federal Government or any branch, department or agency thereof, and to resist the usurpation of the rights and powers reserved to this state and our sister states by the Federal Government or any branch, department or agency thereof." H.B. 880, § 5, 1 Race Rel. L. Rep. at 593.

A quarter of a million dollars was appropriated to the commission. Miss. H.B. 891, 1956, 1 Race Rel. L. Rep. 595. The committee consists of members from both houses of the legislature, from the executive branches and from the public.

In 1958, the Mississippi legislature added a new device to its investigative arsenal by authorizing the secretary of state to ask the attorney general or the general investigating committee or both to investigate any organizations with a Mississippi branch which

> "has a national or state officer or director who either in the past, or at present, is, or has been, an officer, or director, of any . . . group listed . . . as a subversive or communist-front group . . . by the United States Attorney General, or a Congressional Committee on Un-American Activities. . . ." Miss S.B. 1973, 3 Race Rel. L. Rep. 556 (1958).

In addition a Senate concurrent resolution asked the General Investigating Committee to investigate the NAACP. *Southern Education Reporting Service, Status of Segregation-Desegregation in the Southern and Border States* 16 (1958).

In Arkansas, the legislature created a State Sovereignty Commission, modeling its act closely on that of Mississippi, including the distribution of representation on the committee and the definition of powers. Ark. Act 83, 1957, 2 Race Rel. L. Rep. 491. This Act and others enacted at the same session were challenged in a declaratory judgment suit in the United States district court. *Smith v. Faubus*, 2 Race Rel. L. Rep. 1103 (1957). The court stayed proceedings pending an authoritative construction of the statutes by the state courts. The plaintiffs then filed a complaint in Pulaski County Chancery Court seeking a declaration that four acts were unconstitutional and for an injunction. By stipulation the contest of two of the Acts was stricken from the complaint and the case was submitted only as to Act 83, *supra*, and Act 85, 2 Race Rel. L. Rep. 495 (discussed *infra*). The court ruled the acts valid and constitutional and dismissed the prayer for injunction with prejudice. 3 Race Rel. L. Rep. 978 (1958).

2. Registration Statutes

When continuous public scrutiny is deemed desirable, legislatures turn, as noted in Part II, *supra*, to registration statutes. Sometimes such statutes are already available for new uses. Sometimes they must be created for the occasion. Several states have enacted such legislation with varying classification language which could include the NAACP. Some are worded so as to apply to organizations on both sides of the segregation question. In others it is not immediately apparent without reference

to other materials and background what organizations are intended to be included.

a. Pre-existing Statutes

Louisiana found no need to enact a new statute. Nearly a quarter of a century before the *School Segregation Cases*, its legislature had enacted a law aimed at the Ku Klux Klan which was broad enough to include the NAACP. La. Rev. Stat. Tit. 12 §§ 401 et seq. (1950). Moving under this statute, the Louisiana attorney general sought an injuction restraining the NAACP, its officers and Louisiana members from conducting any activities in the state because of failure to register and file membership lists as required by the state. *Louisiana ex rel. Le Blanc v. Lewis*, 1 Race Rel. L. Rep. 571, 573 (La. Dist. Ct. 1956). While this suit was pending, the defendants took steps to remove the case to a federal district court. However, the state court issued an injunction, 1 Race Rel. L. Rep. 571, and the defendants asked the federal court to enjoin further proceedings. 1 Race Rel. L. Rep. 576 (E.D. La. 1956). The federal court said that removal of the case acted as an automatic injuction on further state court action, but decided:

> "In the interest . . . of avoiding unseemly conflict with the State Court, this court is going to defer action on this motion for an injunction against further proceedings in the State Court in order to give the defendants in . . . [the State Court action] an opportunity to go before the proper State Courts in whatever appellate procedures are followed in the State Courts, including the United States Supreme Court, to seek dissolution of the injunction issued by the State Court subsequent to the removal."

Upon appeal of the state court injunction, the First Circuit Court of Appeal of Louisiana held the cause had been removed to the federal court upon filing of necessary papers, thereby depriving the state courts of any further jurisdiction either at the trial or appellate level. *Louisiana ex rel. Gremillion v. NAACP*, 90 So.2d 884, 2 Race Rel. L. Rep. 185 (1956). Subsequent developments were described as follows in the American Jewish Congress account:

> "The way now seemed clear for a contest of the state registration law in the Federal court and for resumption of NAACP's public activities. However, Jack Gremillion, State Attorney General, took a different view. In a public letter to the NAACP, he said that he was 'confused, just like everybody else', by the ruling of the Louisiana Court of Appeals, but that he was still prepared to enforce the penal provisions of the law against the NAACP if it did not register. . . . On December 12, 1956, a cordon of patrol cars assembled outside an NAACP meeting in New Orleans, in an obvious attempt at intimidation. Shortly afterward Gremillion advised the New Orleans District Attorney that, until the NAACP registered, it could be prosecuted for holding meetings. . . . On the last day of 1956, the New Orleans branch yielded the names of its 300 members and other chapters thereafter followed suit. 'We're assuming,' said one NAACP official, 'that the only reason the Attorney General wanted to put us out of business was because we hadn't filed our membership lists. He gave us an opportunity to file and we took him up on it.' The NAACP is now free again to operate in Louisiana." *American Jewish Congress, supra*, at 18-19.

b. New Statutes

Statewide registration laws enacted in the various states since the *School Segregation Cases, supra*, include:

Arkansas: Act 85, 1957, 2 Race Rel. L. Rep. 495, requires registration of persons or organizations who solicit or collect contributions to aid in (a) lobbying for federal laws limiting state control of schools; (b) lobbying against state laws to preserve state's rights; (c) recruiting plaintiffs in litigation involving operation of domestic institutions, particularly schools; and (d) promotion of Arkansas public school integration or providing gratuitous legal aid to such Negroes "as may be involved" in litigation over admission to a public school in the state. The act requires such persons to keep detailed records of the sources and disposition of funds collected, including the names and addresses of all contributors and beneficiaries.

Act 12, 1958 Extraordinary Session, 3 Race Rel. L. Rep. 1054, requires the filing of extensive information by organizations "engaged in activities designed to hinder, harass and interfere with the powers and duties of the State of Arkansas to control and operate its public schools, upon the request of the county judge." A maximum fine of $200 is provided for violations.

Act 10, 1958 Extraordinary Session, 3 Race Rel. L. Rep. 1049, requires all public school and state college employes to file, as a condition precedent to employment, affidavits listing all organizations to which they have belonged or contributed in the previous five years. Any contract entered into without such an affidavit on file was declared null and void and any money paid under it recoverable against either the employees or the officials who hired them. A maximum fine of $1,000 and forfeiture of teaching license are provided upon conviction of filing a false affidavit.

South Carolina: Act No. 223, 1957, 2 Race Rel. L. Rep. 852, repeals Act No. 741, 1956, *supra*, Subsection B, which flatly prohibited NAACP members from being hired or kept on the payroll. In its place, the new statute requires applicants for public employment to list organizations in which they hold membership.

Another 1957 Act requires any organization which "has as its policy equal rights for members of any race, creed or color" to list the names and addresses of its members.

Tennessee: Ch. 151 Public Acts, 1957, Tenn. Code Ann. §§ 39-5001-7 (Supp. 1958), 2 Race Rel. L. Rep. 498, requires registration of those who promote or oppose legislation for or against any race, or whose activities tend to cause racial conflicts or violence, or who raise funds for racial litigation.

Ch. 152, Public Acts, 1957, Tenn. Code Ann. §§ 39-827-34 (Supp. 1958), 2 Race Rel. L. Rep. 497, requires filing of information, including names of members and donors, by organizations, individuals and others soliciting funds to finance litigation.

Texas: H. B. 5, 2nd 1957 Special Session, 3 Race Rel. L. Rep. 90, authorizes county judges to require registration of any organization "engaged in activities designed to hinder, harass, and interfere with the powers and duties of the State of Texas to control and operate its public schools and which activities may result in serious disturbance of the public peace." The organizations must file membership lists and other information upon request of a county judge. See also opinion of the Texas attorney general on the constitutionality of a proposed integrationist registration act. 2 Race Rel. L. Rep. 752 (1957).

Virginia: Ch. 31, 1956 Extra Session, 2 Race Rel. L. Rep. 1015, requires individuals or groups soliciting funds to finance litigation of others to file full information, including lists of members and contributors with the State Corporation Commission.

Ch. 32, 1956 Extra Session, 2 Race Rel. L. Rep. 1021, requires registration with the corporation commission of persons and groups engaged in promoting or opposing legislation in behalf of a race or color, or advocating racial integration or segregation or whose activities tend to cause racial conflicts or violence, or engaged in raising or expending funds in connection with litigation.

Both Chapters 31 and 32 were declared unconstitutional by a three-judge United States District Court, one judge dissenting, and their enforcement was enjoined. *NAACP v. Patty*, 159 F.Supp. 503, 3 Race Rel. L. Rep. 274 (1958). The court's decree also enjoined enforcement of Chapter 35 of the same session, 2 Race Rel. L. Rep. 1017, defining and providing punishment for barratry, and withheld jurisdiction as to two other statutes pending their construction by the state courts. See *Inciting Litigation*, 3 Race Rel. L. Rep. 1257 (1958). At the time the *Patty* case was decided, the Supreme Court had not handed down its decision in *NAACP v. Alabama ex rel. Patterson, supra*. Before reaching the constitutional questions, the majority of the district court had to dispose of contentions that the corporate plaintiff had no standing to assert the rights of its members and that the federal courts will not declare a state statute unconstitutional in the absence of prior construction of the statute by the state courts. On both points the majority reached its decisions in the face of a vigorous dissent which questioned the majority's conclusions on the facts, on the law and even on the accuracy of precedents. Of the plaintiff corporation's standing, the majority said:

> "In these days, when corporate organization is well-nigh necessary for the conduct of large enterprises, the propriety of including them within the protection of the Act would seem to be obvious; and since the word 'person' in the Fourteenth Amendment has been broadly construed to include corporations in the protection of their property rights, there is no good reason why the same liberality of interpretation should not be used when the corporation is formed not for purposes of profit but for the protection of the liberties of the individuals." 159 F. Supp. at 519, 3 Race Rel. L. Rep. at 286.

In disposing of the contention that jurisdiction should be withheld pending construction of the statutes by the state courts, the majority said:

> "We are advised that Virginia is not alone in enacting legislation seriously impeding the activities of the plaintiff corporation through the passage of similar laws (43 Va. L. Rev. 1241). As heretofore noted, the problem for determination is essentially a federal question with no peculiarities of local law. Where the statute is free from ambiguity and there remains no reasonable interpretation which will render it constitutional, there are compelling reasons to bring about an expeditious and final ascertainment of the constitutionality of these statutes to the end that a multiplicity of similar actions may, if possible, be avoided." 159 F.Supp. at 523, 3 Race Rel. L. Rep. at 289.

Turning to the constitutional question, the court distinguished the case of *New York ex rel. Bryant v. Zimmerman, supra,* Section II, saying:

> "The statute is not aimed, as the act considered in *People of State of New York ex rel. Bryant v. Zimmerman,* at curbing the activities of an association likely to engage in violations of the law, but at bodies who are endeavoring to abide by and enforce the law and have not themselves engaged in acts of violence or disturbance of the peace." 159 F.Supp. at 526, 3 Race Rel. L. Rep. at 291.

The majority of the court laid great stress upon the events leading up to the special session at which the acts were passed in determining what it called the purpose of the statute and what the dissenting judge called the motive. The whole history of Virginia's "massive resistance" to integration was detailed at the outset of the opinion. In concluding a discussion of the constitutionality of Chapter 32, the majority said:

> "Undoubtedly a state may protect its citizens from fraudulent solicitation of funds by requiring a collector to establish his identity and his authority to act; and the state may also regulate the time and manner of the solicitation in the interest of public safety and convenience. *Cantwell v. Connecticut,* 310 U.S. 296, 306, 60 S.Ct. 900, 84 L.Ed. 1213; *Thomas v. Collins,* 323 U.S. 516, 540, 65 S.Ct. 315, 89 L.Ed. 430. Corrupt Practices Acts which seek to preserve the purity of elections by requiring the disclosure of the identity of those who strive to influence the choice of public officials are also a proper subject of legislative regulation. *Burroughs v. United States,* 290 U.S. 534, 54 S.Ct. 287, 78 L.Ed. 484. The statute before us, however, presents a very different case. It requires not merely the identity of the collector of the funds but the disclosure of the name of every contributor. In effect, as applied to this case, it requires every person who desires to become a member of the Association and to exercise with it the rights of free speech and free assembly to be registered, and the size of his contribution to be shown. This seems to us far more onerous than the requirement of a license to speak, which was struck down as unconstitutional in *Thomas v. Collins, supra,* especially as in this instance the disclosure is prescribed as a part of a deliberate plan to impede the contributors in the assertion of their constitutional rights. In our opinion all four clauses of § 2 as applied to the plaintiffs in this case are unconstitutional.
>
> "In reaching this conclusion we may fairly consider not only the rights of the plaintiff corporations but also the rights of the individuals for whom they speak, particularly the rights of the members of the Association and generally the members of the colored race in whose interests the plaintiffs carry on their work. The rights that plaintiffs assert take their color and substance from the rights of their constituents; and it is now held that where there is need to protect fundamental constitutional rights the rule of practice is relaxed, which confines a party to the assertion of his own rights as distinguished from the rights of others." 159 F.Supp. at 528-29, 3 Race Rel. L. Rep. at 293.

For like reasons, the court struck down Chapter 31, which it noted covered much the same ground as one of the clauses in Chapter 32.

Upon appeal by the Virginia attorney general, the Supreme Court of the United States noted probable jurisdiction. *Harrison v. NAACP,* 79 S.Ct. 33, 3 L.Ed.2d 53, 3 Race Rel. L. Rep. 867 (1958).

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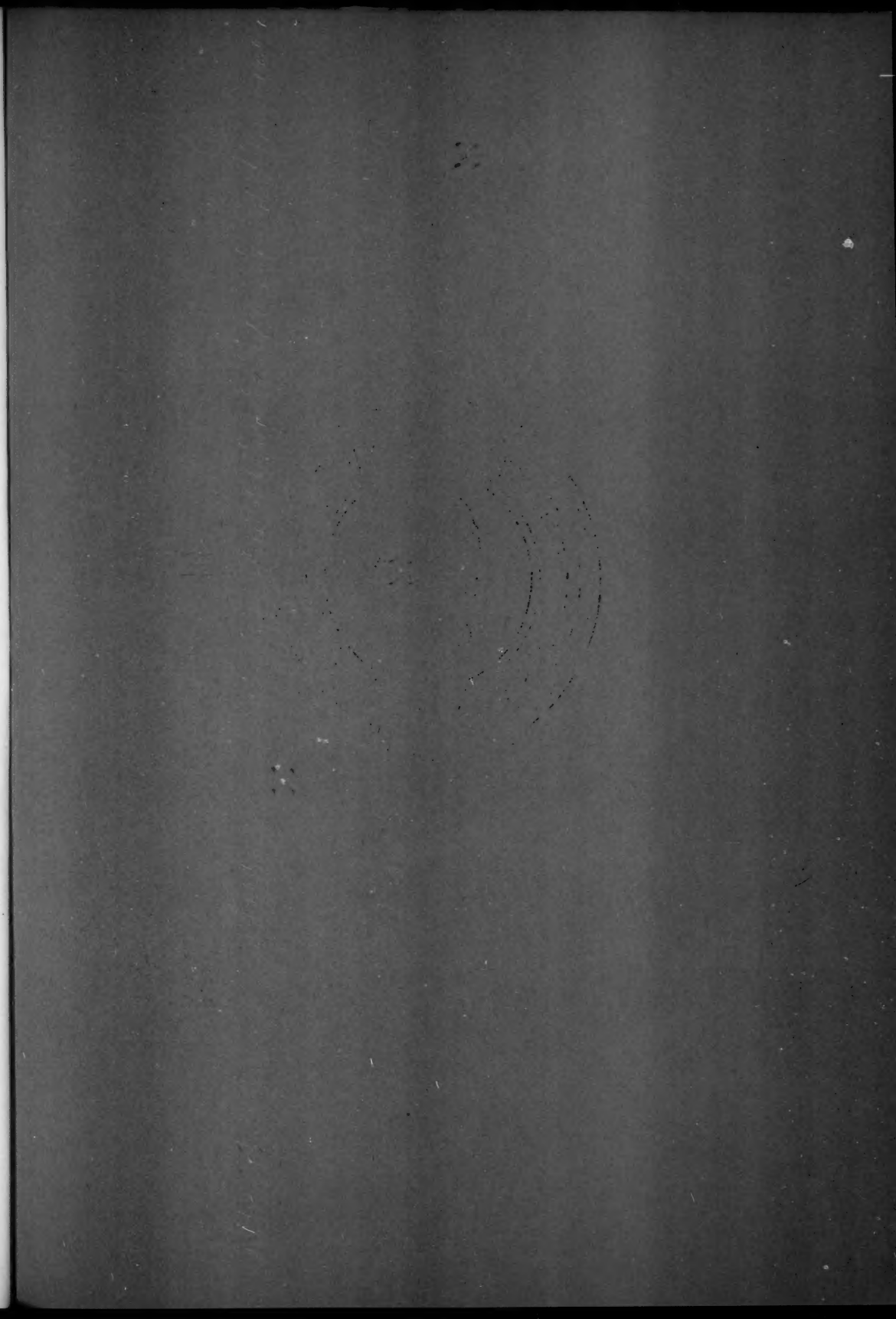


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